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No. 493

CUSTOMS APPEALS NOS. 4899 AND 4900

United States Court of Customs and Patent Appeals

Nos. 4899 and 4900

THE UNITED STATES,

vs.

AMERICAN BITUMULS & ASPHALT CO., et al.

CUSTOMS APPEAL No. 4899.

AMERICAN BITUMULS & ASPHALT CO., et al.,

vs.

THE UNITED STATES.

CUSTOMS APPEAL No. 4900.

TRANSCRIPT OF RECORD
On Appeal From the United States Customs Court

GEORGE COCHRAN DOUB,
Assistant Attorney General,
Attorney for the Government.

HARRETTS, PALEY & CARTER,
Attorneys for the Importers.

DEC 1956
COPY RECEIVED
Attorney General
Civil Division
Customs Section

NO. 4899 FILED OCTOBER 17, 1956
NO. 4900 FILED OCTOBER 18, 1956

Printed DEC 10 1956

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United States Court of Customs and Patent Appeals

CUSTOMS APPEAL

No. 4899

THE UNITED STATES, Appellant,

vs.

AMERICAN BITUMULS & ASPHALT CO., et al., Appellees.

Petition for Review

To the Honorable the United States Court of Customs and Patent Appeals:

Your petitioner, being dissatisfied with the decision and judgment of the United States Customs Court in each of the matters referred to in the annexed Schedule A, respectfully prays your court to review the questions involved therein, and for such relief in the premises as to the court shall seem just. The particulars of the errors of law and fact involved in said decision and judgment with which your petitioner is dissatisfied are set forth in the annexed Assignment of Errors.

Dated, New York, N. Y., October 15, 1956.

THE UNITED STATES

By GEORGE COCHRAN DOUB
Assistant Attorney General, Civil Div.
Attorney for Appellant
201 Varick Street
New York, N. Y.

By RICHARD E. FITZGIBBON,
Chief, Customs Section

Assignment of Errors

The United States Customs Court has erred as follows:

1. In sustaining the protests herein and in entering judgment in favor of the plaintiffs.

2. In not overruling the protests herein and in not entering judgment in favor of the defendant.

3. In finding and holding that Part IV of Presidential Proclamation No. 2901 was ultra vires, illegal, and null and void.

4. In not finding and holding that Part IV of Presidential Proclamation No. 2901 was merely ineffective because it was redundant and unnecessary.

5. In finding and holding that Presidential Proclamation No. 2901 "was, so to speak, the proximate cause of both the termination of the Mexican Trade Agreement rate and the establishment of a new rate as to over-quota petroleum, etc."

6. In not finding and holding that Presidential Proclamation No. 2901 merely terminated, insofar as over-quota petroleum, etc., was concerned, the prior proclamations making effective the rates on such merchandise as were contained in the Trade Agreement with Mexico.

7. In finding and holding:

> It has been shown, too, that the provisions of the statute, Section 350, with respect to increases in rates of duty are referable to terminating proclamations.

8. In not finding and holding that a proclamation which terminates prior proclamations making effective rates of duty in trade agreements, is not a proclamation increasing rates of duty under Section 350.

9. In finding and holding that by operation of law the rate of duty on over-quota crude petroleum became 3/8 of 1

cent per gallon upon the termination of the proclamations making effective the Trade Agreement with Mexico.

10. In not finding and holding that upon the termination of the proclamation making effective the Trade Agreement with Mexico the rate of duty on over-quota petroleum became ½ of one cent per gallon.

11. In not finding and holding that upon the termination of the rates of duty established by the proclamations making effective the Mexican Trade Agreement, the rates of duty established by the proclamations making effective the Venezuelan Trade Agreement again became operative.

12. In finding and holding contrary to the law and contrary to the intent of the Congress.

Schedule A

Port: Baltimore, Md.
Subject: Crude petroleum, etc.
Decided: August 24, 1956

Protest	*Vessel*	*Entry No.*	*Date of Entry*
191794-K/13619	Palmar	2644	11/13/51
191795-K/13578	"	1661	10/ 1/51
191797-K/13620	Cornell	2982	11/23/51
191825-K/13569	"	1662	10/ 1/51
191827-K/13579	"	1895	10/15/51
207944-K/13807	Palmar	809	8/18/52
207945-K/13812	Kettle Creek	1434	9/23/52
208727-K/13808	Clarkswharf	895	8/25/52
208729-K/13810	Rock Landing	1090	9/ 3/52
185246-K/13475	Pan New York	833	8/15/51
185255-K/13476	Palmar	961	8/22/51
190251-K/13528	Cornell	1200	9/ 4/51

State of New York
City and County of New York } ss.:

WILLIAM A. TIETJEN, being duly sworn, deposes and says that he is over the age of 21 years; that he is a clerk in the office of the Assistant Attorney General in charge of customs cases; that on the 15th day of October, 1956 deponent served the within judgment upon Sharretts, Paley & Carter, Esqs., attorneys for the appellee herein, by depositing a true copy thereof, properly enclosed in a securely closed and duly franked official wrapper of the United States Department of Justice, in a letter box duly maintained by the United States Government and under the care of the Post Office at New York City, addressed to said attorneys at No. 52 Broadway, N. Y. C., that being the address designated by appellee for that purpose upon the preceding papers herein.

WILLIAM A. TIETJEN

Sworn to before me this 15 day of Oct. 1956.

MARY K. McQUADE
(SEAL) Notary Public, State of New York
No. 31-2516400
Qualified in New York County
Commission expires March 30, 1957

Endorsed: United States Court of Customs and Patent Appeals. Filed Oct 17 1956. Cabell N. Pryor, Clerk.

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

CUSTOMS APPEAL

No. 4900

AMERICAN BITUMULS & ASPHALT Co., et al., Appellant,

vs.

THE UNITED STATES, Appellee.

Petition for Review

To the Honorable The United States Court of Customs and Patent Appeals:

Your petitioner, being dissatisfied with the decision and judgment of the United States Customs Court in the matter referred to in the annexed Schedule "A", respectfully prays your Court to review the questions involved therein, and for such relief in the premises as to the Court shall seem just. The particulars of the errors of law and fact involved in said decision and judgment with which your petitioner is dissatisfied are set forth in the annexed assignment of errors.

AMERICAN BITUMULS &
ASPHALT CO., et al.
Petitioners

By SHARRETTS, PALEY & CARTER
Attorneys for Appellant
52 Broadway
New York 4, New York

Dated: New York, New York, October 16, 1956.

Assignment of Errors

The United States Customs Court has erred as follows:

1. In holding that Part IV of Presidential Proclamation No. 2901 was severable for purposes of construction of said proclamation.

2. In not holding that said Part IV was not severable from the remainder of the proclamation.

3. In not holding that said Proclamation No. 2901 insofar as it related to petroleum, must be construed as an entirety.

4. In not holding that, as written, said proclamation was void, insofar as it pertained to the rate of duty on petroleum and petroleum products.

5. In not holding that with respect to the petroleum in controversy, the rate of duty had not been changed by said Proclamation No. 2901, since said proclamation was void and a nullity, insofar as it pertained to petroleum.

6. In not holding that the rate of duty applicable to the imported merchandise was ¼ cent per gallon, since said rate had never been lawfully changed.

7. In not holding that the proclamation made to carry out the Trade Agreement with Mexico, T. D. 50797 was the lawful authority under which the duty on the merchandise at bar should have been assessed.

8. In not entering judgment directing assessment of duty on said merchandise at ¼ cent per gallon.

9. In not holding that the rate of duty in effect for petroleum on January 1, 1945, ¼ cent per gallon, was still in effect at all times relevant to the merchandise at bar.

Schedule "A"

Port: Baltimore, Md.
Subject: Crude petroleum, etc.
Decided: August 24, 1956

Protest	*Vessel*	*Entry No.*	*Date of Entry*
191794-K/13619	Palmar	2644	11/13/51
191795-K/13578	"	1661	10/ 1/51
191797-K/13620	Cornell	2982	11/23/51
191825-K/13569	"	1662	10/ 1/51
191827-K/13579	"	1895	10/15/51
207944-K/13807	Palmar	809	8/18/52
207945-K/13812	Kettle Creek	1434	9/23/52
208727-K/13808	Clarkswharf	895	8/25/52
208729-K/13810	Rock Landing	1090	9/ 3/52
185246-K/13475	Pan New York	833	8/15/51
185255-K/13476	Palmar	961	8/22/51
190251-K/13528	Cornell	1200	9/ 4/51

SCHEDULE OF PROTESTS

Protest No.	*Plaintiff*	*Entry No.*
191794-K/13619	American Bitumuls & Asphalt Co., et al.	2644

Indorsed: United States Court of Customs and Patent Appeals. Filed Oct 18 1956. Cabell N. Pryor, Clerk.

Notice of Appearance

CUSTOMS APPEAL No. 4899

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

THE UNITED STATES

vs.

AMERICAN BITUMULS & ASPHALT Co. et al.

The Clerk will enter my appearance as Counsel for the appellees,

(Name) SHARRETTS, PALEY & CARTER

(P. O. Address) 52 Broadway, New York 4, New York

Indorsed: United States Court of Customs and Patent Appeals. Filed Oct 22 1956. Cabell N. Pryor, Clerk.

Return to Court of Customs and Patent Appeals

UNITED STATES CUSTOMS COURT

UNITED STATES, Appellant,

v.

AMERICAN BITUMULS & ASPHALT Co. et al., Appellees.

Suit 4899

and

AMERICAN BITUMULS & ASPHALT Co. et al., Appellants,

v.

UNITED STATES, Appellee.

Suit 4900

The petitioner above named, having applied to the United States Court of Customs and Patent Appeals for a review

of the questions of law and fact involved in a decision of the United States Customs Court in the above case, and the said Court having ordered this Court to transmit to said Court the record, evidence, exhibits, and samples, together with a certified statement of the facts involved in the case and its decision thereon:

Now, therefore, pursuant to said order, the United States Customs Court does hereby transmit to said Court of Customs and Patent Appeals the record, evidence, exhibits, and samples in said case, together with a certified statement of the facts involved in the case, and also its decision thereon.

This return specifically comprises the following: A copy of

1. Protest 191794-K/13619, with the report of the collector of customs.
2. Certificate of similarity.
3. Stipulation of counsel.
4. The decision in question (C. D. 1799) and judgment.

The entry papers will be forwarded later.

WITNESS, The Honorable Chief Judge of the United States Customs Court, this 1st day of November, A. D. 1956.

FRANK P. MILLER
Deputy Clerk.

(Seal)

CRUDE PETROLEUM—PETROLEUM FUEL OIL—INTERNAL REVENUE TAX—TRADE AGREEMENTS—

PRESIDENTIAL PROCLAMATION

Protest No. 191794-K/13619

Protest 13619

NEW YORK July 30, 1952

COLLECTOR OF CUSTOMS
PORT OF Baltimore

Sir:

Notice of dissatisfaction is hereby given with and protest is hereby made against your decision, liquidation and assessment of duties or taxes at ½ cent per gallon under section 3422 of the Internal Revenue Code (26 U.S.C. § 3422) covered by the following entry:

Entry No:	2644
Entry Date.:	11-13-51
Vessel:	PALMAR
Liquidated:	6-30-52 I

We claim that said merchandise is properly dutiable or taxable at only ¼ cent per gallon under section 3422 of the Internal Revenue Code (26 U.S.C. § 3422) as amended by the Trade Agreement with Venezuela, T. D. 50015, and the General Agreement on Tariffs and Trade, T. D. 51802, by virtue of section 350 of the Tariff Act of 1930, as amended.

The reasons for objection are that the General Agreement on Tariffs and Trade modifies the provisions of the Trade Agreement with Venezuela and not only provides a more favorable customs treatment for topped crude petroleum and fuel oil derived from petroleum including fuel oil known as gas oil than that provided in the Trade Agreement with Venezuela, but also requires the preferential application of its provisions to the instant importation. We claim that the portions of the Trade Agreement with

Venezuela relating to topped crude petroleum and fuel oil derived from petroleum including fuel oil known as gas oil, were suspended by the General Agreement on Tariffs and Trade in accordance with the terms of said General Agreement on Tariffs and Trade and Section 350 of the Tariff Act of 1930, as amended, and that the only portion of section 3422, as modified by the Trade Agreement with Venezuela, that is currently in effect is that portion which applies to crude petroleum.

The quantity of crude petroleum imported in the calendar year 1951 has not exceeded the amount determined by the Director of the Bureau of Mines, United States Department of the Interior, published in T. D. 52684, which represents 5 per cent of the total quantity of crude petroleum processed in refineries in the continental United States during the calendar year 1950. The quantity of crude petroleum imported from the instant country of exportation has not exceeded the individual allocations to the several exporting countries as set forth in T. D. 52684.

We further claim that there is no basis in law for the assessment of the duty or tax herein and that said assessment is wholly illegal, null and void.

It is further and alternatively claimed that if this merchandise is dutiable at a rate of duty or tax higher than ¼ cent per gallon, it is properly dutiable at only ⅜ cents per gallon under said section 3422 by virtue of section 350 (a) of the Tariff Act of 1930, as amended, the Trade Agreement with Mexico, T. D. 50797, and T. D. 52559.

Respectfully,

AMERICAN BITUMULS & ASPHALT CO.

Protestant

SHARRETTS, HILLS & PALEY
Attorneys for Protestant
52 Broadway
New York 4, New York

FILED
U. S. CUSTOMS COURT
NEW YORK, N. Y.
SEP. 18 8:57 AM 1952
WM. F. X. BAND, CLERK

RECEIVED
AUG. 1 1952
LIQUIDATING DIV.
U. S. CUSTOMS SERVICE
BALTIMORE, MD.

Report of the Collector

191794-K

FILED
U. S. CUSTOMS COURT
NEW YORK, N. Y.
SEP. 18 8:57 AM 1952
WM. F. X. BAND, CLERK

REPORT OF COLLECTOR ON PROTEST

UNITED STATES CUSTOMS SERVICE

Protest No. 13619

The merchandise covered by the annexed protest was classified in liquidation as Petroleum fuel oil under
(Describe the merchandise as nearly as possible in the language of the provision of the tariff act, other law, or trade agreement)
Sec. 3422 of I. R. C.—TD 50015—TD 52559 and assessed
(State paragraph of Tariff Act of 1930, section of Internal Revenue Code, or other provision)
with duty at the rate of ½¢ per gal.

Quota on petroleum products allocated to Venezuela was filled on June 19, 1951, as per Bureau of Customs letter to the Collector of Customs, Baltimore, Maryland, dated September 12, 1951.

The protested decision was reviewed by me in accordance with section 515, Tariff Act of 1930, and was affirmed.

Basis of affirmation: Special report of Appraiser of Merchandise, Baltimore, Md., dated September 3, 1952.

The protest was received within the statutory period.

I. B. GEIDT
Deputy Collector.

September 15, 1952
(Date)

wpt

Certificate of Similarity

I hereby certify that protest 191794-K/13619 and the report of the collector of customs are typical of all the other protests and reports, which protests are enumerated in the petition for review herein.

EDWARD J. CAREY
(Seal) Deputy Clerk, United States Customs Court.

FILED
U. S. CUSTOMS COURT
NEW YORK, N. Y.
MAR. 31 3:55 PM 1955
WM. F. X. BAND, CLERK

UNITED STATES CUSTOMS COURT
First Division

American Bitumuls & Asphalt Co., et al., Plaintiffs,

v.

The United States, Defendant.

Protest No. 191794-K/13619-52, etc.

Stipulation

It is Stipulated and Agreed by and between counsel for the parties hereto as follows:

1. That all of the protests enumerated on Schedule A, annexed hereto and made a part hereof are consolidated and shall be tried together.

2. That the facts stated on the entry papers covered by each of said protests, with respect to the rate of tax imposed, the date of entry and the date of liquidation are true and correct and shall be accepted as facts in this case

3. That the merchandise covered by said protests consisting of crude petroleum or fuel oil derived from petroleum was assessed with duty at ½¢ per gallon. The authority relied on for the assessment was the Presidential Proclamation reported in T. D. 52559.

4. It is not claimed that at the time of importation of the merchandise it was entitled to a lesser rate of duty by virtue of the quota provisions in the Trade Agreement with Venezuela (T. D. 50015).

5. That the protests are hereby submitted.

6. That the plaintiff shall be given sixty days after the date of filing of this stipulation to file its brief and defendant sixty days thereafter to reply.

Dated: New York, N. Y., March 24, 1955.

SHARRETTS, PALEY & CARTER
Attorneys for Plaintiff

By JOSEPH F. DONOHUE

WARREN E. BURGER,
Assistant Attorney General
Civil Division

By RICHARD E. FITZGIBBON
Chief, Customs Section

Approved:
Irvin C. Mollison
Judge.

Schedule A

Baltimore

191794-K/13619-52	American Bitumuls & Asphalt Co.
191795-K/13578-52	"
191797-K/13620-52	"
191825-K/13569-52	"
191827-K/13579-52	"
207944-K/13807-53	"
207945-K/13812-53	"
208727-K/13808-53	"
208729-K/13810-53	"
185246-K/13475-52	American Bitumuls Co.
185255-K/13476-52	"
190251-K/13528-52	"

Decision of the Customs Court

(C. D. 1799)

AMERICAN BITUMULS & ASPHALT CO. ET AL. *v.* UNITED STATES

United States Customs Court, First Division

Protests 191794-K/13619, etc., against the decision of the collector of customs at the port of Baltimore.

(Decided August 24, 1956)

MOLLISON, Judge: This case relates to a number of protests brought by the plaintiffs, as importers of crude petroleum and petroleum fuel oil, alleging the taking of tax or duty at an unlawful rate. All of the merchandise here involved was assessed with tax or duty at the rate of ½ cent per gallon under the provisions of section 3422 of the Internal Revenue Code. Various Presidential proclama-

tions were also involved in the assessment, as will appear hereinafter.

As originally filed, the protests claimed that the proper rate of tax or duty assessable on the merchandise was ¼ cent per gallon, and each protest, either as filed or by timely amendment, alternatively claims a rate of ⅜ cent per gallon under section 3422 of the Internal Revenue Code, by virtue of section 350 (a), as amended, of the Tariff Act of 1930, and the Presidential proclamations involved.

The present case has been submitted for decision upon a stipulation of counsel reading as follows:

> IT IS STIPULATED AND AGREED by and between counsel for the parties hereto as follows:
>
> 1. That all of the protests enumerated on Schedule A, annexed hereto and made a part hereof are consolidated and shall be tried together.
>
> 2. That the facts stated on the entry papers covered by each of said protests, with respect to the rate of tax imposed, the date of entry and the date of liquidation are true and correct and shall be accepted as facts in this case. [*Sic.*]
>
> 3. That the merchandise covered by said protests consisting of crude petroleum or fuel oil derived from petroleum was assessed with duty at ½% per gallon. The authority relied on for the assessment was the Presidential Proclamation reported in T. D. 52559.
>
> 4. It is not claimed that at the time of importation of the merchandise it was entitled to a lesser rate of duty by virtue of the quota provisions in the Trade Agreement with Venezuela (T. D. 50015).
>
> • • • • •

The facts and the statutory law applicable show the case to be, in all material respects, similar to that which was

decided by a majority of our appellate court in *United States* v. *Metropolitan Petroleum Corp., Herbert B. Moller*, 42 C. C. P. A. (Customs) 38, C. A. D. 567, reversing the decision of this court reported as *Metropolitan Petroleum Corp.* and *Herbert B. Moller* v. *United States*, 31 Cust. Ct. 71, C. D. 1547. Defendant urges that the decision in the said case is *stare decisis* of all of the issues presented herein. Plaintiffs, however, urge a new examination of the matter, citing what are claimed to be certain inconsistencies and anomalies in and flowing from the said decision, and certain aspects of the matter not previously explored. Plaintiffs contend that such an examination would lead to substantially different findings and conclusions of law from which a different result would ensue.

When the *Metropolitan* case was before this court, we set forth in our decision a résumé of the law, including both statutes and amendatory Presidential proclamations, forming a background for both the assessment and the claims made. On pages 40 and 41 of the report, in volume 42 of the United States Court of Customs and Patent Appeals Reports (Customs), of its decision in that case the majority of our appellate court quoted the said résumé as concisely setting forth the undisputed sequence of events preceding the imposition of the tax in question. As the facts in the case at bar do not call for a different summary, for the sake of brevity, the quoted portion referred to will be adopted and incorporated herein by reference as though fully set out.[1]

There does not seem to be any doubt but that the entire controversy herein revolves about the nature and effect of

[1] It should be noted that section 350 (a), as amended, of the Tariff Act of 1930, as in existence at the times of importation here involved, was subsequently further amended by the Trade Agreements Extension Act of 1955, 69 Stat. 162. We are here concerned, however, with the statute as it existed prior to the last-named amendment, i. e., as cited and quoted in the résumé referred to.

Presidential Proclamation No. 2901, reported in volume 85 of Treasury Decisions at page 252, and numbered T. D. 52559. In its decision in the *Metropolitan* case, the majority of our appellate court succinctly stated the issue in this fashion:

> • • • The determinative question—in fact, the controlling if not only issue in the case—is whether the rate of tax applicable to petroleum products, such as that at bar, was increased beyond the 50 per cent limit laid down by Congress in Section 350, as amended, as a result of the proclamation to which we have herein referred.

After having thus defined the issue, the majority of our appellate court held that the rate of tax applicable to petroleum products had *not* been increased beyond the 50 per centum limit laid down by Congress in section 350, as amended, *as a result of the proclamation.*

In reaching this conclusion, the majority of our appellate court indicated that, in its view, the controlling factor was not proclamation No. 2901 but was the continued existence at all pertinent times of the provisions of the Venezuelan Trade Agreement, which it characterized as a "solemn binding document between the two countries." The court said, among other things—

> • • • We respect, recognize, and sustain the Venezuelan Agreement as being fully effective upon the termination of the Mexican Agreement, regardless of anything that might be inferred to the contrary from what was set forth by the Executive in the terminating proclamation.

From the foregoing, it would appear that our appellate court was applying to the situation and enforcing the pro-

visions of the Venezuelan Trade Agreement *as such* and not the Presidential proclamation, issued in relation thereto.

The court also quoted with approval from the brief of the appellant before it language embodying the appellant's contention that the Presidential proclamation issued in 1939 and relating to the Venezuelan Trade Agreement, reported in T. D. 50015, had been superseded when the Mexican Trade Agreement proclamation (reducing the rate on petroleum, etc.) had gone into effect in 1943, but that when the Mexican Trade Agreement proclamation was terminated—

> • • • the rate in the proclamation of the Venezuelan Agreement • • • again became operative with respect to over-quota fuel oil by force of law alone, and it needed no legislative action or proclamation to restore its not defunct but merely dormant rate to effectiveness.

In so holding, our appellate court indicated that it was in entire agreement with the position of the appellant in the case before it that proclamation No. 2901 was unnecessary to effect any change of rates and that the act of the President in part IV of the proclamation, proclaiming a rate of ½ cent per gallon on overquota petroleum and fuel oil, was not a legally effective exercise of Presidential power but was merely declaratory of what had occurred by operation of law, and, presumably, was issued merely for the guidance of administrative officers and others concerned.

Before this court, the Government now relies upon the foregoing expressed in its brief in the *Metropolitan* case, *supra*, and has disavowed any support for the view that the

trade agreement with Venezuela, and not the proclamation relating thereto, was the controlling factor.

It seems clear that, at least in part, in the view taken by our appellate court, the increase in the rate of duty applicable to overquota petroleum, etc., resulted, not from proclamation No. 2901, but from the enforcement of the Venezuelan Trade Agreement as municipal or national law of the United States. The implications of this view, with particular reference to the operation of the Trade Agreements Act and its various extensions, we think warrants closer examination of the entire matter.

We believe there can be no doubt but that, by the Trade Agreements Act, both as originally drawn and as amended, it was sought to blend the power of the Executive as the nation's instrument of foreign relations and the power of Congress to regulate commerce and to impose taxes and duties so that the declared purposes of the act should be consummated.[2]

The device of international executive agreements was to be employed in conjunction with the familiar device of delegation to the President of power, by following an intelligible principle and an announcement procedure (proclamation),[3] to change the customs and revenue laws of the United States to meet the challenge of the world situation which brought the act into being.

The Trade Agreements Act envisions two separate parts to the process, an external part which manifests itself in the agreement between the President, representing the Government of the United States, and the representative or representatives of the governments of other nations, and

---

[2] McClure, Wallace, International Executive Agreements (Columbia University Press, 1941) pp. 186 ff.

[3] *Field* v. *Clark*, 143 U. S. 649, 680; *J. W. Hampton, Jr., & Company* v. *United States*, 276 U. S. 394, 409.

an internal part, the action taken by the President under legislatively delegated power to effect changes in the customs and revenue laws of the United States. Inasmuch as it appears to be considered that the internal part of the process in the case with which we are here concerned was unnecessary and that the change in the law was effected by or through the external action, we think a discussion of the nature and effect of executive agreements might be helpful.

There are at least three types of so-called "executive agreements."[4] The first type is those made with foreign governments under the President's own, independent, constitutional powers. An example of this type of agreement was that which was the subject of *United States* v. *Belmont et al., Executors*, 301 U. S. 324, involving recognition of foreign governments, a matter solely within the competency of the President. The question as to the effect of such agreements upon constitutional rights and conflicts with acts of Congress has apparently not yet been completely settled (see *Seery* v. *United States*, 127 F. Supp. 601, and *United States* v. *Guy W. Capps, Inc.*, 204 F. 2d 655),[5] but is of no materiality in this case, inasmuch as the executive agreements with which we are here concerned were not of this type.

The other two types of executive agreements are (1) those to which effect is not accorded, until approval and implementation is given by the Congress—again, not the type of agreement here involved—and (2) those which are made pursuant to or in accordance with specific direction

[4] See, in this connection, a statement prepared by the Secretariat of the United Nations, approved by the U. S. Department of State, in Laws and Practices Concerning the Conclusion of Treaties, United Nations Legislative Series, 1952, p. 130.

[5] The decision in the *Capps* case was affirmed by the Supreme Court (348 U. S. 296) on other grounds.

of authorization by the Congress and having, as their subjects, matters which are particularly within the constitutional powers of Congress.

It is this last type of agreement with which we are here concerned, i. e., one authorized by both houses of Congress under a statutory scheme permitting the President, in effect as the agent of Congress, to alter the tariff rates prescribed by the Congress.

In setting up in section 350 of the Tariff Act of 1930, the statutory machinery to effect the desired purpose, it is clear that Congress followed, in broad outline, the arrangement used in the flexible tariff provisions of the present tariff act, section 336, and in its predecessor, section 315 of the Tariff Act of 1922. That method of changing tariff rates to meet changing conditions had been tested and found constitutional. *J. W. Hampton, Jr., & Company* v. *United States*, 276 U. S. 394.

In its essentials, it required on the part of the Congress the establishing of certain criteria to guide the President and the prescribing of certain limits of change. On the part of the President it required the completion of certain conditions precedent and the use of a proclamation to effect the change in the law.

It is not open to doubt that, in the case of the flexible tariff provisions, it is the proclamation of the President which changes the law. The President, acting as the agent of the legislature, proclaims new tariff rates.[4] The proclamation is akin to the legislative act. It is not merely declaratory of a situation which exists without it—it is the law itself.

As has been said, the use of the device of delegating authority to the President to change tariff rates under an in-

[4] *Norwegian Nitrogen Products Company* v. *United States Tariff Commission*, 274 U. S. 106, at p. 11.

telligible principle and in accordance with certain conditions and limitations was incorporated into the Trade Agreements Act and into the extensions thereof here involved. Retained as a basic and integral part of the device was the requirement that the President *proclaim* the modifications of duties, restrictions upon imports, or customs or excise treatment of articles covered by foreign trade agreements. The act refers, not to the "agreed" duties and other import restrictions, but to the "proclaimed" duties and other import restrictions, a clear indication that Congress considered the trade agreement to be in the nature of a condition precedent to the issuance of a valid proclamation, *but that the change in the law is effected, not by the trade agreement, but by the proclamation.* By this means, not only is the inherently legislative character of the act preserved, but also the constitutional separation of powers is maintained.

And the situation is the same whether the proclamation be one initiating changes in the law following a trade agreement or one terminating an earlier initiating proclamation. Congress carefully preserved the law-making character of the terminating proclamation by providing that "The President may at any time terminate any such *proclamation* in whole or in part." [Italics added.] Note that it was not provided that the President might terminate any such "agreement" in whole or in part (which would be an act essentially executive in character), but it was provided that he might terminate any such "proclamation" in whole or in part. It is manifest that Congress did not contemplate that the *external* act of the President, in either unilaterally or bilaterally bringing to an end a trade agreement in whole or in part, should, in itself, alter the municipal or national law of the United States with respect to cus-

toms and excise taxes or duties. All changes in the laws of the United States were to be wrought by *proclamations*, not *agreements*.

And it is quite clear that this view of the essential character of the proclamation was shared by the President of the United States, who, in Article XIX of the Venezuelan Trade Agreement, agreed that:

> The present Agreement shall be *proclaimed* by the President of the United States of America and shall be ratified by the Government of the United States of Venezuela *in conformity with the laws of the respective countries*. • • • [Italics added.]

It is to be noted, too, that, in its opening recitals, every proclamation, including those here involved, issued by the President of the United States with respect to trade agreements, states not only that the agreements involved were made—

> • • • pursuant to the authority vested in the President by the Constitution and the statutes, including section 350 of the Tariff Act of 1930, • • •

but also that the proclamation itself is made under the authority conferred by the said act.

In this connection, see also, in particular, recital No. 7 of proclamation No. 2901, wherein the President refers to the final sentence of section 350 (a) as his authority for the termination of any trade agreement proclamation made under said section 350 (a).

We think it is unquestionable that the proclamation of the President is the law-making act contemplated by section 350, *supra*, and that it is consequently essential to effect any change in the laws of the United States with respect to matters treated in trade agreements. The sug-

gestion that the agreement of the President to initiate or to terminate a trade agreement under authority of section 350, *supra*, could *ex proprio vigore* establish, alter, or affect the law of the United States is untenable.[7]

It seems clear, therefore, that, but for the issuance of a proclamation such as proclamation No. 2901, no change in the rate of tax or duty on the products here involved could have been put into effect.

There are only two parts in the announcement section of proclamation No. 2901 which have any relation to the taxes or duties leviable upon the products here involved, namely, part I (*b*) and part IV. Part I (*b*) proclaims the termination in whole of the earlier proclamations, putting into effect the Mexican Trade Agreement rates, and part IV proclaims specific rates of tax applicable to crude petroleum, topped crude petroleum, and fuel oil derived from petroleum.

In our opinion in the *Metropolitan* case, we pointed out that we were impressed by the fact that, in part IV of the proclamation, the President specifically proclaimed the definite rates of tax or duty to be applicable to those products and did not leave room for any assumption or conjecture as to the rates intended to be applied. With respect to part IV of the proclamation, the defendant has taken the position, as expressed in its brief herein and before our appellate court in the *Metropolitan* case, as follows:

> * * * In the circumstances, the part of Proclamation No. 2901 which purported to carry out the Venezuelan Agreement and the General Agreement *was redundant*, and it cannot, therefore, be properly considered as

[7] See, in this connection, Senate Document No. 244, 78th Congress, 2d Session, entitled "Treaties and Executive Agreements," particularly at pp. 17-21.

having been intended to be a legally effective part of the power exercised by the President *in terminating the Mexican Trade Agreement Proclamation.* [Italics added.]

The language quoted, particularly when the italicized portions are emphasized, would appear to indicate that the defendant considers part I (*b*) of the proclamation, that part terminating the earlier proclamations relating to the Mexican Trade Agreement, to be valid, but that part IV, which, by its terms, purports to carry out the Venezuelan agreement and the general agreement, was redundant, its purpose having been already secured by part I (*b*) and the original Presidential proclamation, issued in 1939, in connection with the Venezuelan Trade Agreement. Leaving aside the effect of part I (*b*) for the moment, we may consider this view of the defendant as to part IV.

We are of the opinion that part IV of the proclamation was *ultra vires*, and consequently void, for the reason that in that portion of the proclamation the President exceeded the powers conferred upon him by the Trade Agreements Extension Act of 1945. We do not think that we may consider that part IV was legally ineffective because it was redundant or unnecessary. Aside from all other considerations, there is a direct bar to such treatment on our part.

In common with proclamations generally, and particularly those issued under authority of section 350 of the Tariff Act of 1930, proclamation No. 2901 consists of a number of recitals of inducements, followed by the announcements of actions taken predicated upon those inducements. In inducement recital No. 16, the President stated:

WHEREAS *I determine that it is required or appropriate* to carry out the said trade agreements speci-

fied in the first and twelfth recitals of this proclamation on and after January 1, 1951, that crude petroleum, topped crude petroleum, and fuel oil derived from petroleum, including fuel oil known as gas oil, entered, or withdrawn from warehouse, for consumption in any calendar year in excess of an aggregate quantity of all such products equal to 5 per centum of the total quantity of crude petroleum processed in refineries in continental United States during the preceding calendar year, as provided in said item 3422 set forth in the thirteenth recital of this proclamation shall be subject to import tax at the rate of ½¢ per gallon; [Italics added.]

* * * * *

This was a determination by the President that it was required or appropriate that certain action be taken. There is no question but that this determination by the President formed the basis for the announcement of his action in part IV of the proclamation. Save for necessary changes in wording to effect the manifest purpose, both provisions are couched in identical language.

It is well settled that the determination of the President in such matters that action by him is required or appropriate is not subject to judicial review. In *United States* v. *George S. Bush & Co., Inc.*, 310 U. S. 371, a case relating to a Presidential proclamation made under the flexible tariff provisions of the Tariff Act of 1930, the Supreme Court of the United States said (pp. 379-80):

> * * * And the judgment of the President that on the facts, adduced in pursuance of the procedure prescribed by Congress, a change of rate is necessary is no more subject to judicial review under this statutory

scheme than if Congress itself had exercised that judgment. It has long been held that where Congress has authorized a public officer to take some specified legislative action when in his judgment that action is necessary or appropriate to carry out the policy of Congress, the judgment of the officer as to the existence of the facts calling for that action is not subject to review. *Martin* v. *Mott*, 12 Wheat. 19; *Monongahela Bridge Co.* v. *United States*, 216 U. S. 177; *Dakota Central Telephone Co.* v. *South Dakota*, 250 U. S. 163; *United States* v. *Chemical Foundation, Inc.*, 272 U. S. 1. As stated by Mr. Justice Story in *Martin* v. *Mott*, *supra*, pp. 31-32: "Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts."

To hold, therefore, as counsel for the defendant would have us do, that the action taken by the President in part IV of the proclamation was legally ineffective *because unnecessary* would be to hold that it was neither required nor appropriate that he should take action. This we cannot do. The President was the sole judge of whether it was required or appropriate for him to specifically proclaim rates, and he stated in clear and unequivocal terms that it was required or appropriate that such action be taken. We may not review the question of whether it was necessary, required, or appropriate for him to take such action, but we may review, and, indeed, under the issues of this case, must review the question of whether that action was within the limits of the power conferred upon him by the Congress.

By the Trade Agreements Extension Act of 1945, in force and effect on the date of Presidential Proclamation No. 2901, it was explicitly provided that—

> * * * No proclamation shall be made increasing or decreasing by more than 50 per centum any rate of duty, however established, existing on January 1, 1945 (even though temporarily suspended by Act of Congress), or transferring any article between the dutiable and free lists.

The rate of duty applicable to crude petroleum, topped crude petroleum, and fuel oil derived from petroleum existing on January 1, 1945, was ¼ cent per gallon. By his action in part IV of proclamation No. 2901, in establishing at ½ cent per gallon the rate of tax or duty applicable to all overquota petroleum and petroleum products, the President decreed an increase over the rate existing on January 1, 1945, of 100 per centum. The President, therefore, failed to keep within the law under which he acted, and his act was *ultra vires* and of no effect. *William A. Foster & Co. (Inc.) et al.* v. *United States*, 20 C. C. P. A. (Customs) 15, T. D. 45673. Compare, also, *Little et al.* v. *Barreme et al.*, 2 Cranch (6 U. S.) 170; *Youngstown Sheet & Tube Co. et al.* v. *Sawyer*, 343 U. S. 579.

It is the contention of the plaintiffs that proclamation No. 2901, insofar as it relates to the rates applicable to petroleum, etc., must be considered as an entirety and that parts I (*b*) and IV of the proclamation, insofar as they relate to petroleum and petroleum products, were interdependent and must stand or fall together. Consequently, plaintiffs argue, to that extent, the invalidity of part IV attaches to and characterizes part I (*b*), the effect being that the rates of duty prescribed by the Mexican Trade

Agreement proclamations with respect to petroleum and petroleum products were never legally terminated.

It is to be noted that, save in respect to his actions with respect to petroleum and petroleum products, plaintiffs do not question the right and power of the President to terminate the earlier proclamations relating to the Mexican Trade Agreement, nor the right and power of the President to proclaim adjustments in rates of duty determined by him to be required and appropriate to carry out other trade agreements in view of that termination.

There can be no question but that the proclamation in part IV of specific rates for petroleum and petroleum products was made by the President, *in view of the termination* in part I (*b*) of the earlier Mexican Trade Agreement proclamations, that is to say, the action of proclaiming the increase was taken because of the action terminating the earlier proclamations.

It was the view of this court in the *Metropolitan* case, *supra*, that the parts of the proclamation, insofar as they relate to petroleum and petroleum products, both in terminating the Mexican Trade Agreement proclamation rate and in establishing the increased rate, were not severable, and that the invalidity of part IV extended to part I (*b*), so that the ¼ cent per gallon rate established by the Mexican Trade Agreement proclamations was unaffected by proclamation No. 2901.

It is quite obvious that it is the view of the defendant, and, insofar as the brief of the defendant was quoted by our appellate court in the *Metropolitan* case, the view of that court, that part I (*b*) is severable from part IV.

The rules of construction with respect to partial invalidity of statutes are applicable to Presidential proclama-

tions.[9] Crawford, in section 144 of The Construction of Statutes (St. Louis, 1940), gives the following as a test:

> • • • In determining separability, the test is whether the legislature has manifested an intention to deal with a part of the subject matter covered, irrespective of the rest of the subject matter; if such an intention is manifest, the subject matter is separable. If the valid parts are complete in themselves and independent of the invalid parts and capable of being executed according to the intention of the legislature, they must be sustained by the court, notwithstanding partial invalidity.

It must be admitted that, in connection with proclamation No. 2901, there is nothing at all to show a *manifest* intent on the part of the President to deal with the termination of the earlier Mexican Trade Agreement proclamations insofar as they relate to petroleum and petroleum products independently of the increase in rate to be applied to such commodities. Seemingly, one action was taken in the light of the other.

The second sentence quoted above from Crawford, however, seems to offer a slightly different approach. The statement therein contained is similar to a more expanded version contained in the case of *Allen* v. *Louisiana*, 103 U. S. 80, in which the Supreme Court said:

> It is an elementary principle that the same statute may be in part constitutional and in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected.

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[9] 91 C. J. S., United States, § 30; *United States* v. *Chemical Foundation, Inc.*, 272 U. S. 1, 13.

> "But," as was said by Chief Justice Shaw, in *Warren v. Mayor and Aldermen of Charlestown* (2 Gray (Mass.), 84), "if they are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must fall with them." The point to be determined in all such cases is whether the unconstitutional provisions *are so connected with the general scope of the law as to make it impossible, if they are stricken out, to give effect to what appears to have been the intent of the legislature.* [Italics added.]

These statements indicate that it is requisite to a determination of separability because of partial invalidity that it be possible to give effect to the intent of the legislature without the invalid parts of the law. Applied to the situation at bar, this would require a determination of the question of whether effect could be given to the intent of the legislature if part IV were severed from the proclamation as invalid. We think that it could.

What was the intent of the legislature with respect to the rate which might be imposed on overquota petroleum, etc.? To determine this, we must look not alone to the last prior Presidential proclamation on the subject, as defendant contends, but to all of the law which has bearing on the matter and which may be indicative to the legislative intent. It must be remembered that, by the Trade Agreements Act, both as originally enacted and as amended, Congress did not surrender jurisdiction over the tariff to

the President, but created only an agency which might be exercised under certain conditions, and retained ultimate control, as it was bound to do, in itself.

Defendant's contention herein is based upon the premise that, during the existence of the Presidential proclamations relating to the Mexican Trade Agreement, the Presidential proclamation issued in 1939, relating to the Venezuelan Trade Agreement, was in a state of suspension or dormancy. Upon the termination of the proclamations relating to the Mexican Trade Agreement, defendant contends, the proclamation relating to the Venezuelan Trade Agreement (particularly with respect to overquota petroleum, etc.) was restored to full force and effect by operation of law.

The position of the defendant is based upon a concept of "operation of law" in its application to the situation at hand as an automatic return to the 1939 proclamation rate, without any consideration being given to intervening factors. We do not think that the term "operation of law" has such a connotation of blindness to the actual state of the law on the subject.

In its usual signification, the term is generally applicable to matters involving title and refers to situations in which rights, and sometimes liabilities, are created without action by parties. An example is intestacy. The right of the party in whom the estate is vested is not acquired by his act or that of the intestate; it is the effect of the law applicable to situations of intestacy.

It is said also to mean "The obligation of law" (67 C. J. S., p. 505), and the case cited for this reference is *United States* v. *Hammond*, 26 Fed. Cas. 96, No. 15,293, an early case which is source material for many law dictionary definitions and judicial decisions on the subject of operation of law. In that case, the majority of the Circuit Court

for the District of Columbia, speaking through Circuit Judge Cranch, observed:

> What then is the operation of a law? A law is alway in operation as long as it is the rule of conduct on the subject upon which it is intended to operate; that is, as long as the subject is bound to obey it, or conform his conduct to its provisions. The operation of a law can be nothing more than the obligation of a law. A law ceases to operate when it is no longer obligatory, and as long as it is obligatory it is in full operation. • • •

"Operation of law" means "its practical working and effect," (67 C. J. S., p. 505, *supra*) and many of the cases collated under the title "OPERATION OF LAW" in 29 Words and Phrases, Permanent Edition, pages 578-9, and 1956 cumulative pocket part, page 146, are based upon this meaning. For example, see *Miller Jewelry Co.* v. *Dickson*, 111 Ind. App. 676, 42 N. E. 2d 398, wherein it was held that a surrender of a lease arises by "operation of law" where the parties do something so inconsistent with the relation of landlord and tenant as to imply that they have both agreed to consider the surrender as made.

Running through all of the definitions and cases on the subject is a common thread that operation of law means the practical effect of what the law is intended to be on the subject. In the case of the laws of intestacy, it is the fulfillment of the intent of the State that title to property shall always vest in someone who is readily identifiable. In the *Hammond* case, which involved a question of jurisdiction in a criminal case, it was held to be the intent of the law on the subject that the laws of Virginia should remain in force in the territory (District of Columbia) ceded by that Commonwealth to the Congress as the seat

of the Government until Congress framed laws for the Government of the district. In the lease cases, recognition and practical effect were given to the unexpressed intent of the parties.

To determine the practical effect of the intent of the law on the subject of the rate of duty applicable to overquota petroleum, etc., at the time of importation of the present merchandise, requires a consideration of legislative actions, including both Presidential proclamations and congressional acts, having relation to the subject matter. These are, in effect, statutes *in pari materia* and must be construed together.

After the suspension, in 1943, by the proclamations relating to the Mexican Trade Agreement, of the rates effectuated in 1939 by the Venezuelan Trade Agreement proclamation, certain changes took place in the laws of the United States which had their impact upon the suspended Venezuelan Trade Agreement proclamation.

The first change that took place occurred by virtue of the act of July 5, 1945 (59 Stat. 410), which amended section 350, *supra*, by tying the 50 per centum limit within which the President might change rates of duty to the rates existing on January 1, 1945, rather than to the rates existing at the time of the passage of the original Trade Agreements Act of 1934, which may be called the "statutory" rates. Congress must be presumed to have known that an increase in duty would be the result of a proclamation terminating an earlier trade agreement proclamation by which an "existing" rate of duty had been reduced. Prior to January 1, 1945, the calculation was based upon "existing," i.e., statutory or 1934, rates of duty. Consequently, for example, if a trade agreement proclamation providing for a 50 per centum decrease of the statutory or 1934 rate of duty were terminated in whole prior to

January 1, 1945, the resulting increase would be 50 per centum of the statutory or 1934 rate.

However, on and after January 1, 1945, the rates were tied, not to the statutory or 1934 rates, but to the rates "existing on January 1, 1945." If both the initial reduction by trade agreement proclamation and the termination occurred after January 1, 1945, the increase resulting from termination in whole would restore the January 1, 1945, rate and be within the 50 per centum limit. But, if the initial reduction had occurred by proclamation prior to January 1, 1945, as in the present case, the increase resulting by termination in whole of that proclamation after January 1, 1945, would be 100 per centum if the pre-1945 rate were restored, and 50 per centum if the January 1, 1945, rate were restored.

Indeed, it would seem that the prohibition against *increasing* duties by more than 50 per centum was as much concerned with the increases which would result from *termination* proclamations, as from initiating proclamations. Note that the President was given power to *modify*, i. e., reduce, existing duties. Further, the stated basis upon which the President was authorized to issue proclamations was to relieve undue burdens and restrictions upon the foreign trade of the United States, and it could scarcely have been contemplated that either this basis or the avowed purposes of the act, as stated in section 350 (a), as amended, would have been served by proclamations, based upon foreign trade agreements, *initiating* increases in duties.

The second change that took place was the Presidential proclamation relating to the General Agreement on Tariffs and Trade, reported in T. D. 51802, which fixed the rate applicable to topped crude petroleum and fuel oil derived from petroleum at ¼ cent per gallon with the following proviso:

Provided, That in no event shall the rate of import tax applicable under section 3422, Internal Revenue Code, or any modification thereof, to topped crude petroleum or fuel oil derived from petroleum be less than the rate of such tax applicable to crude petroleum.

While this proclamation did not itself fix a rate of tax applicable to crude petroleum, it tied the rate applicable to the products named to the rate, whatever it might be, which would be in effect during the life of the general agreement proclamation, thus pointing up the need for definiteness and certainty as to the rate which would be applicable. At the time the proclamation relating to the general agreement went into effect, the rate of tax applicable to crude petroleum was ¼ cent per gallon, by virtue of the Mexican Trade Agreement proclamations, and, consequently, that rate was applicable to topped crude petroleum and fuel oil derived from petroleum. Doubtless it was because of this fact that the President, in recital No. 16 of proclamation No. 2901, determined that it was required and appropriate to carry out, not only the Venezuelan Trade Agreement, *but also the General Agreement on Tariffs and Trade,* that crude petroleum should be subject to certain rates.

A consideration of the situation with respect to the tax or duty applicable to overquota crude petroleum, etc., as it existed at the time the Governments of the United States and the United Mexican States agreed that the Mexican Trade Agreement should cease to be effective shows the following: The rates specified in section 3422 of the Internal Revenue Code had been modified by the Presidential proclamation relating to the Venezuelan Trade Agreement, but the effect of that proclamation had been suspended by the proclamations relating to the Mexican Trade Agreement. Presumably, if was desired to put an end to the

reduced rates established as United States law by the said proclamations relating to the Mexican Trade Agreement.

Aside from an act of the legislature, the only way this could be accomplished, so far as the law of the United States was concerned, was by means of an instrument such as was used to put the rates into effect, namely, by a proclamation. Not only is this the clear import of the statute, section 350, *supra*, but it is the means used to effect a tariff change following the termination in whole or in part of trade agreements to which the United States is a party.[9]

However, it is at once apparent that any proclamation which would be made under the authority of section 350, *supra*, would be within the limitation laid down in the amendment to section 350 (a) that—

> No proclamation shall be made increasing or decreasing by more than 50 per centum any rate of duty, however established, existing on January 1, 1945 (even though temporarily suspended by Act of Congress), or transferring any article between the dutiable and free lists.

It may be argued that, if part IV of proclamation No. 2901 were severed from the proclamation, the remainder would not be a proclamation *increasing* a rate of duty, inasmuch as, without part IV, no rate of duty with respect to overquota petroleum, etc., is expressly specified. It is true that with part IV severed, the remainder does not specify in so many words or figures a rate of duty applicable to overquota petroleum, but the language used evinces

[9] See terminating proclamations reported in 74 Treas. Dec. 395, T. D. 49824 (Czechoslovakia); 84 id. 345, T. D. 52346 (Columbia); 85 id. 27, T. D. 52399 (Haiti); 85 id 183, T. D. 52505 (Sweden, Finland, Nicaragua); 85 id. 252, T. D. 52559 (Mexico); 85 id. 295, T. D. 52587 (General Agreement: China); 86 id. 275, T. D. 52770 (Costa Rica); 86 id. 360, T. D. 52838 (Peru); 86 id. 408, T. D. 52874 (General Agreement: China); and 89 id. 106, T. D. 53496 (Uruguay).

an intent to limit a *result* and not a *method*. It has been shown, too, that the provisions of the statute, section 350, with respect to increases in rates of duty, are referable to terminating proclamations. The Government's brief correctly points out that a terminating proclamation need not recite every new rate which results from its action.

Moreover, it has been shown that, in order to apply the doctrine of separability to the proclamation, the intent of the legislature must be ascertained and given effect and that no rate could result by operation of law unless it embodied the practical effect of the intent of the legislature. For these reasons, the original Venezuelan Trade Agreement proclamation, the Trade Agreements Extension Act of 1945, the general agreement proclamation, and proclamation No. 2901, omitting part IV, must be considered to be statutes *in pari materia* and construed, not separately, but with reference to each other, so that the resulting rate is as much a product of the proclamation as of the other laws referred to.

So construed, we find the original Venezuelan Trade Agreement proclamation rates applicable to overquota petroleum to have been subject to the operation of the prohibition against increased rates of duty by proclamation of more than 50 per centum of the rates in effect on January 1, 1945, contained in the Trade Agreements Extension Act of 1945; that the general agreement proclamation indicated an intent to make the rate applicable to topped crude petroleum, etc., not less than whatever rate should be in effect during the life of the said general agreement proclamation for crude petroleum; and that proclamation No. 2901 was, so to speak, the proximate cause of both the termination of the Mexican Trade Agreement rate and the establishment of a new rate as to overquota petroleum, etc.

What was that rate? Obviously, it could not be the original Venezuelan Trade Agreement proclamation rate, because that would be an increase of more than 50 per centum of the rates existing on January 1, 1945. Moreover, in respect to the new rate, inasmuch as it clearly appears that it was the intent of the legislature that the President could not directly proclaim such an increase, it can scarcely be held that it was the intent of the legislature that such increase could be achieved by indirection or inaction. Consequently, it must be held that the Venezuelan Trade Agreement proclamation rate on overquota petroleum, etc., was restored only to the maximum permitted by the statute, to wit, to the extent of an increase of 50 per centum of ¼ cent per gallon, or a total rate of ⅜ cent per gallon.

Not only is this interpretation in harmony and conformity with the laws of the United States as in force and effect at the times here pertinent, but it gives effect thereto, and, furthermore, it does no violence to the external relations of the United States represented by the Venezuelan Trade Agreement. That agreement did not necessarily establish a rate of ½ cent per gallon upon overquota petroleum, etc. Article II of the said agreement, as reported in T. D. 50015, provided that such articles should, on their importation into the United States of America, be exempt from customs and other duties *in excess* of those set forth and provided for in the said agreement. Item 3422 of schedule II of the agreement specified that the rate on overquota petroleum, etc., "shall not exceed" ½ cent per gallon. In other words, the agreement bound the United States not to impose duties in excess of ½ cent per gallon, but did not constitute a barrier to the imposition of duties of *less* than ½ cent per gallon.

The claim in plaintiffs' protests, either as originally filed or as amended, for assessment of the petroleum at bar as

3/8 cent per gallon is, therefore, sustained. In all other respects and as to all other claims, the said protests are overruled.

Judgment will issue accordingly.

IRVIN C. MOLLISON
J.

Concurring:
W. J. O.
C. J.

D. J. W.
J.

Schedule of Protests

Protest No.	*Plaintiff*
191794-K/13619	American Bitumuls & Asphalt Co.
191795-K/13578	
191797-K/13620	
191825-K/13569	
191827-K/13579	
207944-K/13807	
207945-K/13812	
208727-K/13808	
208729-K/13810	
185246-K/13475	American Bitumuls Co. Now operate under the name of American Bitumuls & Asphalt Co.
185255-K/13476	
190251-K/13528	

Judgment

UNITED STATES CUSTOMS COURT

First Division

American Bitumuls & Asphalt Co. et al., Plaintiffs,

vs.

United States, Defendant.

Suit Nos. 191794-K/13619, etc.

This case having been duly submitted for decision to the First Division of the United States Customs Court, and the Court, after due deliberation, having rendered a decision herein; now, in conformity with said decision,

It is Hereby Ordered, Adjudged, and Decreed: that the claim made, either as originally filed or by amendment of the protests enumerated in the protest schedule attached to and made a part hereof, for tax or duty at the rate of 3/8 cent per gallon under section 3422 of the Internal Revenue Code, as amended, be and the same is hereby sustained, and the collector of customs at the port of Baltimore will reliquidate the entries accordingly, and

It is Further Ordered, Adjudged, and Decreed: that in all other respects and as to all other claims the protests be and the same are hereby overruled.

WEBSTER J. OLIVER
IRVIN C. MOLLISON
DAVID J. WILSON
Judges of the United States Customs Court.

Dated at New York 14, N. Y., this the 24 day of August, 1956.

Indorsed: United States Court of Customs and Patent Appeals. Filed Nov 2 1956. Cabell N. Pryor, Clerk.

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BATAVIA, N. Y.

SEP 23 1957
JOHN T. PEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 493

AMERICAN BITUMULS & ASPHALT CO., *et al.*,
Petitioner,

v.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

GRACE M. STEWART,
Attorney for Petitioner,
4545 Connecticut Avenue,
Washington, D. C.

JOSEPH F. DONOHUE,
Of Counsel.

Dated: September 23, 1957.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

AMERICAN BITUMULS & ASPHALT CO., *et al.*,
Petitioner.

v.

THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

To the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of American Bitumuls & Asphalt Co. respectfully shows:

Opinion Below

The opinion of the United States Customs Court (C.D. 1799, R. 15-42), is reported in 37 Cust. Ct. p. 58, C.D. 1799. The opinion of the United States Court of Customs and Patent Appeals (appendix pp. 13-29a) is reported in Treasury Decisions Advance Sheets, Volume 92, No. 32 August 8, 1957, page 42-57, C.A.D. 661, 44 C.C.P.A. (Customs)——.

Jurisdiction

The judgment of the United States Court of Customs and Patent Appeals was rendered June 25, 1957 (appendix p. 29a). The mandate was issued August 2, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. §1256, 62 Stat. 928.

Questions Presented

1. Whether the President, by increasing the rate of duty on crude petroleum from ¼ cent per gallon to ½ cent per gallon by his Proclamation No. 2901 exceeded his authority to modify rates of duty in view of the statutory limitation that

> No proclamation shall be made increasing or decreasing by more than 50 per centum any rate of duty, however established, existing on January 1, 1945.

This question is important in the field of tariff administration and will affect the validity of other presidential actions by proclamation. It is a point of novel impression that has never been reviewed by this court.[1] It should be reviewed because the lower court's decision is demonstrably contrary to the statute.

2. Whether the Court below was correct in holding that Part IV of said proclamation was superfluous and unnecessary, thus overruling the discretionary determination of the President that said Part IV was "required or appropriate" to carry out the provisions of certain named trade agreements, contrary to decisions of this

[1] Except for this case and one other, the legality of a proclamation under the Trade Agreements Act has never been the subject of litigation, although the law has been in effect for 23 years. This resulted principally from the fact that virtually all previous proclamations reduced existing rates and were not subject to challenge that the rate should be higher. *George S. Fletcher* v. *United States*, 25 C.C.P.A. (Customs) 195, T.D. 49294. Substantially the same issues as are here involved were presented in *Metropolitan Petroleum Corp.* v. *United States*, 31 Ct. Cust. Appls. 71, C.D. 1547. The Customs Court held unanimously that the proclamation was *ultra vires* and void. The decision was reversed on appeal (*United States* v. *Metropolitan Petroleum Corp.*, 42 C.C.P.A. (Customs) 38, C.A.D. 567), but the decision rested on the erroneous premise that reduced rates of duty became effective by virtue of the provisions of a trade agreement alone. Hence the validity of the proclamation under the statute was not settled. This court denied certiorari (348 U. S. 858).

court holding that discretionary executive action is not subject to judicial review.

Statement

The statutory tax on imported petroleum has been ½ cent per gallon since 1934. The Trade Agreements Act (appendix p. 1a) permits the President to execute trade agreements with foreign nations undertaking to reduce existing rates within prescribed limits, to make such reductions effective by proclamation and to terminate any such proclamation.

Under the above provisions the President, in 1939, proclaimed a reduction to ¼ cent per gallon on a limited quota of imported petroleum and fixed the rate of over-quota petroleum as not exceeding ½ cent (proclamation under Venezuelan Trade Agreement, appendix p. 5a). In 1942, by proclamation under the Mexican Trade Agreement, the rate of ¼ cent per gallon was extended to all imports of petroleum (appendix p. 6a).

In 1945 the Trade Agreements Act was amended to read:

> No proclamation shall be made increasing or decreasing by more than 50 per centum any rate of duty, however established, existing on January 1, 1945. * * *.

In 1948 the proclamation of the General Agreement on Tariffs and Trade (appendix p. 7a) bound the rate of import tax on topped crude petroleum and certain other forms of petroleum to the rate applicable to crude petroleum.

By Proclamation No. 2901 (appendix p. 7a) effective January 1, 1951, the President stated that the Trade Agreement with Mexico was ended, and that in order to put into effect provisions of the Venezuelan Agreement and the General Agreement on Tariffs and Trade

related to petroleum, he was terminating his proclamation under the Mexican agreement and proclaiming a rate of duty for petroleum of ½ cent per gallon.

The several shipments of petroleum in this case imported during 1951 and 1952, were taxed accordingly.

The importer protested the assessment of the rate of ½ cent per gallon under appropriate law (46 Stat. 734, 19 U.S.C. §1514) claiming that the proper tax was at ¼ cent per gallon. The case was referred to the United States Customs Court. That tribunal held (R. 15-41) that the proclamation was divisible in two parts. Insofar as it proclaimed the termination of the Mexican proclamation and thus ended the effectiveness of the rate of ¼ cent per gallon, it was valid. Insofar as it proclaimed the rate of ½ cent, it violated the statutory limitation quoted above and was void. The Customs Court held that on the termination by proclamation of the rate of ¼ cent, the new rate thereafter effective became so by operation of the law. It held that since such rate necessarily resulted from the effect of Proclamation No. 2901, it would be affected by the limitations in the Trade Agreement Act. The rate resulting from a proclamation could not increase by more than 50 per cent the rate in effect on January 1, 1945. Thus it held that the statutory rate was restored to the extent permitted by the Trade Agreements Act. This was an increase of 50 per cent of the 1945 rate of ¼ cent per gallon, or ⅜ cent per gallon.

Both sides appealed, the importer claiming that the proclamation was illegal and void for all purposes, the government insisting that it was valid to sustain the assessment.

The Court of Customs and Patent Appeals held that the proclamation terminated the rate of ¼ cent and restored the rate of ½ cent, that the power of the President to increase rates of duty by proclamation terminating a lower rate was unaffected by the statutory limitations and that

accordingly the tax was lawfully increased 100 per cent by the proclamation, even though Part IV of the proclamation was void. (It was in Part IV that the President had proclaimed that the rate of ½ cent per gallon was "required or appropriate" to carry out the Venezuelan Agreement and the General Agreement, and was therefore effective).

Thus the court held, in effect, that the proclamation could terminate the rate of ¼ cent and restore the rate of ½ cent, but that it was illegal for the President to affirmatively state this, as he had done in Part IV of the proclamation.

Statutes and Presidential Proclamations

The provisions of the Statutes and the Presidential Proclamations involved in this case are as follows, their pertinent text being set forth in the appendix:

	Appendix A page
Internal Revenue Code, 53 Stat. 414, 26 U.S.C. Section 3422	1a
Trade Agreement Act of 1934, 48 Stat. 943, 19 U.S.C., 1940 Edition, Section 1351 *et seq.*	1a
Trade Agreement Act of 1945, 59 Stat. 410, 18 U.S.C. Section 1351 *et seq.*	3a
Presidential Proclamation following Trade Agreement with Venezuela, 54 Stat. 2404, 75 Treas. Dec. 165, T.D. 50015	5a
Presidential Proclamation following Trade Agreement with Mexico, 57 Stat. 833, 78 Treas. Dec. 190, T.D. 50797	6a
Presidential Proclamation following General Agreement on Tariffs and Trade, 61 Stat. 1103; 82 Treas. Dec. 305, T.D. 51802	7a
Presidential Proclamation No. 2901, following termination of Mexican Trade Agreement, 64 Stat. A 427, 85 Treas. Dec. 252	7a

Reasons for Granting the Writ

The case at bar holds that Presidential Proclamation No. 2901 may increase by 100 per cent the rate of duty existing on January 1, 1945 while the law limits such increase to 50 per cent of said rate. Thus it authorizes the President to exceed the limitation of the law when he is performing a limited part of a legislative function and when the validity of his action depends upon strict compliance with the statute from which he derives his authority. This is directly contrary to decisions of this court holding that whenever the President acts as an agent of the legislature his limited function is to carry out the legislative program *within the limits prescribed by the statute.*[2]

To justify this result, the Court below has in effect reformed and rewritten the proclamation substituting its construction for the purposes clearly expressed by the President. The President stated in Part IV of the proclamation that the rate of ½ cent per gallon was required or appropriate to carry out the provisions of the Trade Agreement with Venezuela and the General Agreement on Tariffs and Trade, but the Court held that the publication of this part of the proclamation was not required or appropriate but was in fact ineffective and unnecessary. The President proclaimed in part 1(b) that he was terminating his earlier proclamation under the Trade Agreement with Mexico, but the Court construed this part of the proclamation as putting into effect the rate of ½ cent per gallon. Thus the court changed the purpose expressed by the President for two vital parts of the proclamation, contrary to the rule frequently expressed

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[2] *Field* v. *Clark*, 143 U. S. 649, *J. W. Hampton Jr. & Co.* v. *United States*, 276 U. S. 394.

by this court that discretionary executive action taken by the President under a statute is not subject to judicial review.[3]

I

In Proclamation No. 2901, the President announced the termination of his proclamation of the Mexican Trade Agreement of 1942. Said proclamation was the authority under which the rate of duty on petroleum had been reduced to 1/4 cent per gallon. The President made clear the reason for terminating the rate of 1/4 cent per gallon through Part 1(b) of the proclamation when he stated in Part IV, his clear intention to put into effect the rate of duty on petroleum provided by the Venezuelan Trade Agreement and the General Agreement on Tariffs and Trade. Thus there can be doubt from the language of Proclamation No. 2901, that, insofar as it related to petroleum, its primary purpose was to put into effect the rate of duty of 1/2 cent per gallon and that the termination of the proclamation under the Mexican Trade Agreement was an incidental accomplishment necessary to the establishment of the higher rate.

It is not questioned that the President has authority to proclaim modifications of duty rates within the limits set by the Trade Agreements Act. Since this power resides fundamentally in Congress and was delegated to the President by statute, the validity of any change in tariff rates made by the President depends upon his compliance with the law under which the right to make such change is authorized.[4] In Proclamation No. 2901 the President stated (Recital 16, appendix p. 11a) that in

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[3] *United States* v. *George S. Bush & Co., Inc.*, 310 U. S. 379, 60 S. Ct. 944.

[4] *Field* v. *Clark, supra.*

his judgment it was required or appropriate to carry out the provisions of the Trade Agreement with Venezuela and the General Agreement on Tariffs and Trade, that imports of petroleum should be subject to tax at the rate of ½ cent per gallon. To carry out this purpose, he terminated (in Part I(b)) the lower rate which had been effective by his proclamation under the Mexican Trade Agreement and (in Part IV) he established again the rate of ½ cent per gallon. There can not be the slightest doubt that by this action the President was attempting to increase by 100 per cent the rate of duty which existed for petroleum on January 1, 1945. This proclamation was void by virtue of the provision in the Trade Agreements Act which forbids any proclamation increasing the duty rates of January 1, 1945 by more than 50 per cent. It was the duty of the lower court to have so held.

II

To avoid a declaration that the proclamation before it was invalid the lower court held that the document was both effective and ineffective for the same purpose. As noted above, it held that Part IV, which actually proclaimed the rate of duty of ½ cent per gallon, was "ineffective to establish any rate whatever." Then it held that the intention of Part I(b) of the proclamation, standing alone, with respect to petroleum "was to restore the situation which had existed prior to the proclamation carrying out the Mexican Trade Agreement and while the Venezuelan Proclamation was in full effect." Part I(b) does not so state and does not purport to do anything but terminate the President's proclamation of 1942. Thus the lower court, in order to sustain the rate of duty imposed on authority of Proclamation No. 2901, first

held that Part IV of the proclamation was ineffective because it violated the statute but then ruled that Part I(b) had the effect which the President was seeking to accomplish and had expressed in Part IV.

The premise upon which the lower court reached its conclusion was its judgment that it could apply to this proclamation the rule permitting the severance of an invalid portion of a statute to give effect to the remainder. The Court cited *Allen* v. *Louisiana*, 103 U. S. 80. But neither that case nor any other holds that the rule permitting severance of an invalid provision of a statute may be applied to give to the remaining provisions, *the effect of that portion which has been adjudged to be invalid.* The proclamation cannot be construed to be effective and ineffective for the same purpose. This is exactly what the court below has done.

III

Where the statute empowers the President with discretion to take certain action upon the happening of certain facts, it is well settled that the President's determination as to the necessity of the action which he took is not subject to judicial review. *Bush* v. *United States, supra.* In Part IV of the proclamation, the President took the action which, he stated, was considered to be required or appropriate. The Court below correctly held that the action taken was beyond the limits of the statute. But the extent of the court's authority was to pass upon the *legality* of the action. It could not review questions of wisdom or necessity. It did so when it held that "while the wording of Proclamation No. 2901 leaves much to be desired, the intended purpose of the proclamation" was valid. *But the purpose that it found to be valid was pre-*

cisely expressed in the wording that it held to be void. It accomplished this by substituting its judgment for that of the President that the proclamation of the rate of ½ cent was necessary. In the *Bush* case it was urged that the President, in carrying out a similar, delegated legislative function related to tariff rates, had illegally calculated and fixed a rate of exchange and that therefore his proclamation was void. This court held that the subject was not within the scope of judicial review. It said (p. 379):

> • • • Whatever may be the scope of appellate jurisdiction conferred by Section 501 of the Tariff Act of 1930, it certainly does not permit judicial examination of the judgment of the President that the rates of duty recommended by the commission are necessary to equalize the differences in the domestic and foreign cost of production.

Here too, the court below reversed the action of the President that the proclamation of a rate of duty was required or appropriate to carry out certain trade agreements. Then it held that the rates were validly established by changing the purpose established in Part I(b) of the proclamation. Aside from the fact that the proclamation cannot be both valid and void in fixing the rate of ½ cent per gallon, the lower court was without authority to change the purposes expressed for the proclamation. Its limited function was to determine the validity of the document, *as written*. As written, the proclamation was void in the purpose expressed through its language, and the court below should have held accordingly.

CONCLUSION

For the reasons set forth above, it is submitted that the petition for a writ of certiorari to the Court of Customs and Patent Appeals should be granted.

Respectfully submitted,

GRACE M. STEWART,
Attorney for Petitioner.

JOSEPH F. DONOHUE,
Of Counsel.

APPENDIX A

STATUTES AND PRESIDENTIAL PROCLAMATIONS

Internal Revenue Code

§3420. Imposition of tax.

In addition to any other tax or duty imposed by law, there shall be imposed upon the following articles imported into the United States unless treaty provisions of the United States otherwise provide a tax at the rate specified in Sections 3422 to 3425, inclusive. 53 Stat. 414.

§3422. Petroleum and derivatives.

Crude petroleum, ½ cent per gallon; fuel oil derived from petroleum, gas oil derived from petroleum and all liquid derivatives of crude petroleum, except lubricating oil and gasoline or other motor fuel, ½ cent per gallon; gasoline or other motor fuel, 2½ cents per gallon; lubricating oil, 4 cents per gallon; paraffin and other petroleum wax products, 1 cent per pound. The tax on the articles described in this section shall apply only with respect to the importation of such articles. 53 Stat. 414.

Trade Agreements Act of 1934

§1351. Foreign trade agreements—Authority of President; modification of duties; altering import restrictions.

(a) For the purpose of expanding foreign markets for the products of the United States (as a means of assisting in the present emergency in restoring the American standard of living, in overcoming domestic unemployment and the present economic depression, in increasing the purchasing power of the American public and in establishing and maintaining a better relationship among various

branches of American agriculture, industry, mining, and commerce) by regulating the admission of foreign goods into the United States in accordance with the characteristics and needs of various branches of American production so that foreign markets will be made available to those branches of American production which require and are capable of developing such outlets by affording corresponding market opportunities for foreign products in the United States, the President, whenever he finds as a fact that any existing duties or other import restrictions of the United States or any foreign country are unduly burdening and restricting the foreign trade of the United States and that the purpose above declared will be promoted by the means hereinafter specified, is authorized from time to time—

(1) To enter into foreign trade agreements with foreign governments or instrumentalities thereof; and

(2) To proclaim such modification of existing duties and other import restrictions, or such additional import restrictions, or such continuance, and for such minimum periods, of existing customs or excise treatment of any article covered by foreign trade agreements, as are required or appropriate to carry out any foreign trade agreement that the President has entered into hereunder. No proclamation shall be made increasing or decreasing by more than 50 per centum any existing rate of duty or transferring any article between the dutiable and free lists. The proclaimed duties and other import restrictions shall apply to articles the growth, produce, or manufacture of all foreign countries, whether imported directly, or indirectly: *Provided*, That the President may suspend the application to articles the growth, produce, or manufacture of any country because of its discriminatory treatment of

American commerce or because of other acts or policies which in his opinion tend to defeat the purposes set forth in this section; and the proclaimed duties and other import restrictions shall be in effect from and after such time as is specified in the proclamation. The President may at any time terminate any such proclamation in whole or in part. 48 Stat. 943.

TRADE AGREEMENTS ACT OF 1945

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the period during which the President is authorized to enter into foreign trade agreements under section 350 of the Tariff Act of 1930, as amended and extended, is hereby extended for a further period of three years from June 12, 1945.

Section 2. (a) The second sentence of subsection (a)(2) of such section, as amended (U.S.C., 1940 edition, Supp. IV, title 19, sec. 1351(a)(2)), is amended to read as follows: "No proclamation shall be made increasing or decreasing by more than 50 per centum any rate of duty, however established, existing on January 1, 1945 (even though temporarily suspended by Act of Congress), or transferring any article between the dutiable and free lists. * * * 59 Stat. 410.

TRADE AGREEMENTS ACT OF 1955

* * * * *

(a) (1) * * *

(A) To enter into foreign trade agreements with foreign governments or instrumentalities thereof:

Provided, That the enactment of the Trade Agreements Extension Act of 1955 shall not be construed to determine or indicate the approval or disapproval by the Congress of the executive agreement known as the General Agreement on Tariffs and Trade.

(B) To proclaim such modifications of existing duties and other import restrictions, or such additional import restrictions, or such continuance, and for such minimum periods, of existing customs or excise treatment of any article covered by foreign trade agreements, as are required or appropriate to carry out any foreign trade agreement that the President has entered into hereunder.

(2) No proclamation pursuant to paragraph (1)(B) of this subsection shall be made—

(A) Increasing by more than 50 per centum any rate of duty existing on January 1, 1945.

(B) Transferring any article between the dutiable and free lists.

(C) In order to carry out a foreign trade agreement entered into by the President before June 12, 1955, or with respect to which notice of intention to negotiate was published in the Federal Register on November 16, 1954, decreasing by more than 50 per centum any rate of duty existing on January 1, 1945.

* * * * *

(5) The President may at any time terminate, in whole or in part, any proclamation made pursuant to this section.

Internal Revenue Code Section	Description of article	Rate of import tax
3422	Crude petroleum, topped crude petroleum, and fuel oil derived from petroleum including fuel oil known gas oil	¼¢ per gal.
	Provided, That such petroleum and fuel oil entered, or withdrawn from warehouse, for consumption in any calendar year in excess of 5 per centum of the total quantity of crude petroleum processed in refineries in continental United States during the preceding calendar year, as ascertained by the Secretary of the Interior of the United States, shall not be entitled to a reduction in tax by virtue of this item, but the rate of import tax thereon shall not exceed	½¢ per gal.
	Provided further, That if this item becomes effective after the beginning of a calendar year the quantity of such petroleum and fuel oil which may be entered or withdrawn from warehouse for consumption at the reduced rate during the remainder of such calendar year shall be one-twelfth of the foregoing quantity multiplied by the number of months (treating any part of a month as a full month) during which this item shall be in effect during such calendar year.	

Article XIX of said Venezuelan Trade Agreement, incorporated in the above proclamation read as follows:

ARTICLE XIX

The present Agreement shall be proclaimed by the President of the United States of America and shall be ratified by the Government of the United States of Venezuela in conformity with the laws of the respective countries. It shall enter into full force thirty days after the exchange of the proclamation and the instrument of ratification, which shall take place in the City of Washington as soon as possible, and shall continue in force until December 15, 1942, unless terminated in accordance with the provisions of Articles VI, IX, or XII.

Unless at least six months before December 15, 1942, the Government of either country shall have given to the other Government written notice of intention to terminate this Agreement on that date, the Agreement shall remain in force thereafter, subject to the provisions of Articles VI, IX, and XII, until six months from such time as the Government of either country shall have given notice to the other Government.

Mexican Trade Agreement Proclamation

Internal Revenue Code Section	Description of article	Rate of import tax
3422	Crude petroleum, topped crude petroleum, and fuel oil derived from petroleum including fuel oil known as gas oil	¼¢ per gal.
3422	Kerosene	¼¢ per gal.
3422	Liquid petroleum asphaltum, including cut-backs and road oil	¼¢ per gal.

PROCLAMATION FOLLOWING GENERAL AGREEMENT ON TARIFFS AND TRADE

Internal Revenue Code Section	Description of article	Rate of import tax
* * *	* * *	
3422	Topped crude petroleum, fuel oil derived from petroleum including fuel oil known as gas oil, and all liquid derivatives of crude petroleum (except lubricating oil and such derivatives specified hereinafter in any item 3422)	1/4¢ per gal.
	Provided, That in no event shall the rate of import tax applicable under section 3422, Internal Revenue Code, or any modification thereof, to topped crude petroleum or fuel oil derived from petroleum be less than the rate of such tax applicable to crude petroleum.	

PRESIDENTIAL PROCLAMATION No. 2901, T.D. 52559

By the President of the United States of America

A Proclamation

* * *

5. Whereas, pursuant to the authority vested in the President by the Constitution and the statutes, including section 350(a) of the Tariff Act of 1930, as amended by the said act of June 12, 1934, the period for the exercise of the authority under the said section 350 having been extended by the joint resolution approved April 12, 1940 until the expiration of three years from June 12, 1940

(ch. 96, 54 Stat. 107), the President of the United States of America entered into a trade agreement with the President of the United Mexican States on December 23, 1942 (57 Stat. 835) and proclaimed such trade agreement by proclamations dated December 28, 1942 (57 Stat. 833) and December 31, 1942 (57 Stat. 909);

6. Whereas the Government of the United States has agreed with the Government of the United Mexican States that the said trade agreement shall cease to be effective after December 31, 1950;

7. Whereas the final sentence of said section 350(a) authorizes the President of the United States to terminate in whole or in part any trade agreement proclamation made under said section 350(a);

• • •

11. Whereas I determine that, following the termination of the said trade agreement specified in the fifth recital of this proclamation, the rates of duty for the following descriptions of products in the ninth recital of the said proclamation of January 1, 1948, as amended and rectified, which are required or appropriate to carry out on and after January 1, 1951, the provisions of subparagraph (c) of numbered paragraph 2 of the said exclusive trade agreement specified in the ninth recital of this proclamation, are the rates specified below in the column at the right of the respective descriptions of products:

• • •

12. Whereas, pursuant to the authority vested in the President by the Constitution and the Statutes, including section 350(a) of the Tariff Act of 1930, as amended by the said act of June 12, 1934, the period for the exercise of the authority under the said section 350 having been

extended by the joint resolution approved March 1, 1937, until the expiration of three years from June 12, 1937 (ch. 22, 50 Stat. 24), the President of the United States of America entered into a definitive trade agreement on November 6, 1939, with the President of the Republic of Venezuela (54 Stat. 2377), which definitive agreement was proclaimed by the President on November 16, 1939, and entered into full force on December 14, 1940, as proclaimed by the President on November 27, 1940 (54 Stat. 2402);

13. Whereas, the item listed under Internal Revenue Code Section 3422 of Schedule II of the said definitive agreement with Venezuela referred to in the twelfth recital of this proclamation provides as follows:

Internal Revenue Code Section	Description of article	Rate of import tax
3422	Crude petroleum, topped crude petroleum, and fuel oil derived from petroleum including fuel oil known as gas oil	¼¢ per gal.
	Provided, That such petroleum and fuel oil entered, or withdrawn from warehouse, for consumption in any calendar year in excess of 5 per centum of the total quantity of crude petroleum processed in refineries in continental United States during the preceding calendar year, as ascertained by the Secretary of the Interior of the United States, shall not be entitled to a reduction in tax by virtue of this item, but the rate of import tax thereon shall not exceed	½¢ per gal.

Provided further, That if this item becomes effective after the beginning of a calendar year the quantity of such petroleum and fuel oil which may be entered or withdrawn from warehouse for consumption at the reduced rate during the remainder of such calendar year shall be one-twelfth of the foregoing quantity multiplied by the number of months (treating any part of a month as a full month) during which this item shall be in effect during such calendar year.

14. Whereas the first item listed under Internal Revenue Code Section 3422 found in Part I of Schedule XX of the said General Agreement specified in the first recital of this proclamation provides as follows:

Internal Revenue Code Section	Description of article	Rate of import tax
3422	Topped crude petroleum, fuel oil derived from petroleum including fuel oil known as gas oil and all liquid derivatives of crude petroleum (except lubricating oil and such derivatives specified hereinafter in any item 3422)	1¼¢ per gal.
	Provided, That in no event shall the rate of import tax applicable under section 3422, Internal Revenue Code, or any modification thereof, to topped crude petroleum or fuel oil derived from petroleum be less than the rate of such tax applicable to crude petroleum.	

15. Whereas upon the termination of the said proclamation of December 31, 1942, the said item 3422 set forth in the thirteenth recital of this proclamation and the said first item 3422 set forth in the fourteenth recital hereof will become fully effective;

16. Whereas I determine that it is required or appropriate to carry out the said trade agreements specified in the first and twelfth recitals of this proclamation on and after January 1, 1951, that crude petroleum, topped crude petroleum, and fuel oil derived from petroleum, including fuel oil known as gas oil, entered, or withdrawn from warehouse, for consumption in any calendar year in excess of an aggregate quantity of all such products equal to 5 per centum of the total quantity of crude petroleum processed in refineries in continental United States during the preceding calendar year, as provided in said item 3422 set forth in the thirteenth recital of this proclamation shall be subject to import tax at the rate of ½ cent per gallon;

Now Therefore, I, Harry S. Truman, President of the United States of America, acting under and by virtue of the authority vested in me by the Constitution and the statutes, including the said section 350 of the Tariff Act of 1930, as amended, do proclaim as follows:

Part I

* * *

(b) The said proclamations of December 28, and 31, 1942, relating to the said trade agreement with the United Mexican States, shall be terminated in whole as of the close of December 31, 1950.

* * *

PART IV

To the end that the said trade agreements specified in the first and twelfth recitals of this proclamation may be carried out, crude petroleum, topped crude petroleum, and fuel oil derived from petroleum, including fuel oil known as gas oil, entered, or withdrawn from warehouse, for consumption in any calendar year beginning with the calendar year 1951, in excess of an aggregate quantity of all such products equal to 5 per centum of the total quantity of crude petroleum processed in refineries in continental United States during the preceding calendar year, specified in the said item 3422 set forth in the thirteenth recital of this proclamation, shall be subject to import tax at the rate of ½ cent per gallon.

• • •

APPENDIX B

OPINION OF THE COURT OF CUSTOMS AND PATENT APPEALS

United States Court of Customs and Patent Appeals

THE UNITED STATES, *Appellant,* *v.* AMERICAN BITUMULS & ASPHALT Co., *et al.*, *Appellees.*	October Term 1956. Cutoms Appeal No. 4899. Customs Calendar No. 37.
AMERICAN BITUMULS & ASPHALT Co., *et al.*, *Appellants,* *v.* THE UNITED STATES, *Appellee.*	October Term 1956. Customs Appeal No. 4900. Customs Calendar No. 38.

RICH, Judge.

These are cross appeals from the decision of the United States Customs Court, First Division (C.D. 1799), sustaining in part, a protest by the imp ter and holding that the tax or duty assessed against the merchandise, which was crude petroleum and fuel oil, should be at the rate of 3/8 cent per gallon, rather than 1/2 cent, as assessed by the collector. It is contended by the Govern-

ment that the rate found by the collector is correct, while the importer contends that the rate should be ¼ cent per gallon or, alternatively, that it should be ⅜ cent per gallon as found by the Customs Court.

The ultimate issue to be decided here is identical with that presented to this court in 1954 and decided in *United States* v. *Metropolitan Petroleum Corp., et al.*, 42 C.C.P.A. (Customs) 38 C.A.D. 567, in which we reversed the decision of the Customs Court, which there applied a rate of ¼ cent per gallon, and held the proper rate to be ½ cent per gallon. Consequently there has been much flailing of old straw because the court below saw fit not to follow our decision in the *Metropolitan* case, bending to the vociferous arguments of the importers that it should not be *stare decisis* because of "certain inconsistencies and anomalies in and flowing from the said decision," as stated in the lower court's opinion. Notwithstanding the importers' new approaches to the issues and the novel result reached in the elaborate opinion of the lower court, we are still of the view that the tax of ½ cent per gallon, held to be the proper rate in the *Metropolitan* case, is the only proper rate and we shall try to state our reasons in sufficiently clear English to avoid further misunderstanding.

The pertinent facts are as follows:

By a series of revenue acts ultimately codified as sections 3420-3422 of the Internal Revenue Code (approved February 10, 1939), Congress imposed a tax of ½ cent per gallon on imported crude petroleum.

The Reciprocal Trade Agreements Act of 1934 (48 Stat. 943, 19 U.S.C. sections 1351-1354) added to the Tariff Act of 1930 a new Section 350 which included the following provisions:

(a) For the purpose of expanding foreign markets for the products of the United States (as a means of assisting in the present emergency in restoring the American standard of living, in overcoming domestic unemployment and the present economic depression, in increasing the purchasing power of the American public and in establishing and maintaining a better relationship among various branches of American agriculture, industry, mining, and commerce) by regulating the admission of foreign goods into the United States in accordance with the characteristics and needs of various branches of American production so that foreign markets will be made available to those branches of American production which require and are capable of developing such outlets by affording corresponding market opportunities for foreign products in the United States, the President, whenever he finds as a fact that any existing duties or other import restrictions of the United States or any foreign country are unduly burdening and restricting the foreign trade of the United States and that the purpose above declared will be promoted by the means hereinafter specified, is authorized from time to time—

(1) To enter into *foreign trade agreements* with foreign governments or instrumentalities thereof; and

(2) *To proclaim* such modification of existing duties and other import restrictions, or such additional import restrictions, or such continuance, and for such minimum periods, of existing customs or excise treatment of any article covered by foreign trade agreements, as are required or appropriate *to carry out any foreign trade agreement* that the President has entered into hereunder. *No proclamation shall be made increasing or decreasing by more than 50 per centum any existing rate of duty*

or transferring any article between the dutiable and free lists. The proclaimed duties and other import restrictions shall apply to articles the growth, produce, or manufacture of all foreign countries, whether imported directly, or indirectly: *Provided,* That the President may suspend the application to articles the growth, produce, or manufacture of any country because of its discriminatory treatment of American commerce or because of other acts or policies which in his opinion tend to defeat the purposes set forth in this section; and the proclaimed duties and other import restrictions shall be in effect from and after such time as is specified in the proclamation. *The President may at any time terminate any such proclamation in whole or in part.* 48 Stat. 943. (Emphasis ours.)

By a trade agreement with Venezuela *made effective on December 16, 1939 by Presidential proclamation dated November 16, 1939* (54 Stat. 2402) the statutory tax of ½ cent per gallon on crude petroleum was reduced to ¼ cent on imports not exceeding a quota of 5 per cent of the total quantity of crude petroleum processed in the refineries of the continental United States during the preceding calendar years. As to crude petroleum in excess of that quota, the agreement did not affect the tax, which thus remained at ½ cent per gallon, the rate established by the Internal Revenue Code.

Thereafter, by a trade agreement with Mexico rendered effective on January 30, 1943 by Presidential proclamations dated December 28 and 31, 1942 (57 Stat. 833, 909) the tax was reduced to ¼ cent per gallon on *all* crude petroleum imported.

The act of July 5, 1945 (59 Stat. 410) amended part (a)(2) of paragraph 350 of the 1930 Tariff Act, quoted

above, by substituting for the second sentence thereof (which we have italicized) the following:

> No proclamation shall be made increasing or decreasing by more than 50 per centum any rate of duty, *however established, existing on January 1, 1945* (even though temporarily suspended by Act of Congress), or transferring any article between the dutiable and free lists. (Emphasis ours.)

The parties agree that the "established rate of duty" on crude petroleum on January 1, 1945, within the meaning of the proviso last quoted, was the tax of ¼ cent per gallon and that the ¼ cent rate was established by the proclamation of the Mexican agreement.

On September 6, 1950, the President issued Proclamation No. 2901, the center of the present dispute, effective January 1, 1951 (64 Stat. A 427, T.D. 52559) which contained numerous "whereas" clauses including the following:

> 6. Whereas the Government of the United States has agreed with the Government of the United Mexican States that the said trade agreement shall cease to be effective after December 31, 1950;
>
> 7. Whereas the final sentence of said section 350(a) authorizes the President of the United States to terminate in whole or in part any trade agreement proclamation made under said section 350(a);
>
> 16. Whereas I determine that it is required or appropriate to carry out the said trade agreements specified in the first [General Agreement on Tariffs and Trade] and twelfth [Trade Agreement with Venezuela] recitals of this proclamation on and

after January 1, 1951, that crude petroleum, topped crude petroleum, and fuel oil derived from petroleum, including fuel oil known as gas oil, entered, or withdrawn from warehouse, for consumption in any calendar year in excess of an aggregate quantity of all such products equal to 5 per centum of the total quantity of crude petroleum processed in refineries in continental United States during the preceding calendar year, as provided in said item 3422 set forth in the thirteenth recital of this proclamation shall be subject to import tax at the rate of ½ cent per gallon; (Matter in backets added).

The proclamations actually made included the following:

Part I

• • •

(b) The said proclamations of December 28, and 31, 1942, relating to the said trade agreement with the United Mexican States, shall be terminated in whole as of the close of December 31, 1950.

• • •

PART IV

To the end that the said trade agreements specified in the first and twelfth recitals of this proclamation may be carried out, crude petroleum, topped crude petroleum, and fuel oil derived from petroleum, including fuel oil known as gas oil, entered, or withdrawn from warehouse, for consumption in any calendar year beginning with the calendar year 1951, in excess of an aggregate quantity of all such products equal to 5 per centum of the total quantity of crude petroleum processed in refineries in continental United States during the preceding calendar year, specified in the said item 3422 set forth in the thirteenth recital of this proclamation, shall

be subject to import tax at the rate of ½ cent per gallon.

* * *

It has been stipulated that the tax or duty of ½ cent per gallon in the instant case was assessed by the collector under the authority of Presidential proclamation 2901, *supra*, and it is evident that such assessment is in accord with Part IV of that proclamation. It is contended by the importer, however, that the proclamation is invalid for the reason that it *purports* to increase by one hundred percent (from ¼ to ½ cent per gallon) the rate of duty existing on January 1, 1945. Such an increase, it is asserted, would violate paragraph (a)(2) of Section 350 of the 1930 Tariff Act as amended July 5, 1945, *supra*, which provides that "No proclamation" shall increase such a rate of duty by more than fifty per cent.

It is contended by the Government, on the other hand, that the words "No proclamation," when taken in context, are limited to such proclamations as give effect to a trade agreement, and do not apply to proclamations, such as the one here involved, which terminate other proclamations.

The first argument advanced in support of the Government's contention relates to the position of the words "No proclamation" in paragraph (a)(2) as amended. They appear in the second sentence of the paragraph, immediately following the statement that the President may proclaim such modifications as are required or appropriate to carry out trade agreements, and they are separated, by the generalization clause, from the sentence authorizing the President to terminate the proclamations previously referred to. The logical inference, the Government contends is that the expression "No proclama-

tion" means no proclamation of the kind referred to in the preceding sentence.

Moreover, says the Government, the termination clause of paragraph 350 does not specify that the termination of a proclamation is to be effected by another proclamation. Accordingly, although a terminating proclamation may, in fact, be necessary, paragraph (a)(2) seems clearly to make a distinction between a carrying-out proclamation and the termination of a proclamation, and to apply the 50 per centum limit only to the former.

It is to be noted that in paragraph (a)(2) as originally drawn the prohibition against rate changes of more than 50 per cent of "any existing rate of duty" was based on rates in existence at the time of its enactment. It was therefore impossible for the termination of *any* proclamation to effect a change of more than 50%, since the termination could do no more than restore a rate which had been legally established either by statute or by a previous proclamation and which served as the base of the 50% prohibition. At that time, therefore, there was no reason for associating the "No proclamation" provision with the *termination* of proclamations. It was only when the amendment of 1945 was made, establishing *new base rates*, that it became possible for a terminating proclamation to effect a change of more than 50 per cent of the *new base rate*.[1] If it had been the intention of Congress at that time to impose a new limitation on the terminating power, it seems reasonable to suppose that it

[1] This case involves the mathematical phenomenon that a reduction from ½ cent to ¼ cent is a 50% reduction while a restoration from ¼ cent to ½ cent is a 100% increase. This causes no difficulty under the language of the second sentence of paragraph (a)(2) so long as the "rate of duty" serving as the base, against which the percent of change is measured, is fixed. But when a duty resulting from a 50% decrease is established as a new base, *after* the

would have done so by an express reference to that power.

The final sentence of paragraph (a)(2) of Section 350, literally construed, gives the President unqualified power to terminate *any* proclamation which he has made under that paragraph; and since it appears to be agreed by the parties that such termination cannot affect rates of duty unless it is proclaimed, it is evident that the paragraph *must* be construed as empowering the President to *proclaim* the termination of *any* proclamation, even if such termination has the effect of raising a rate 100%. It thus seems evident that the second and fourth sentences of the paragraph cannot both be literally construed. Either the second sentence must be read as excluding proclamations which terminate other proclamations, or the fourth sentence must be read as excluding terminating proclamations which would have the effect of increasing or decreasing duties by more than 50 per cent of the 1945 rate. Under such circumstances, there must be departure from a literal interpretation in some respect and it is proper for this court to consider the probable intent of Congress in determining what is the proper interpretation.

It does not seem logical to suppose that Congress would empower the President to enter into and proclaim agreements granting lower rates of duty to foreign countries, presumably in exchange for concessions granted to the United States, and at the same time prohibit him from restoring the original rates if the agreement were terminated and the concessions to the United States withdrawn, resulting in a continuing low rate of

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making of the reduction, as was done by the 1945 amendment, mere restoration of the original rate is bound to be an increase of 100%. This simple arithmetical fact underlies all of the litigation in this and the *Metropolitan* cases.

duty on the foreign goods, with nothing received in exchange. Such an interpretation should not be placed on the statute if its language will support a more reasonable one.

There is a logical reason for placing a limitation on the tariff changes which may be effected by proclamations giving effect or carrying-out trade agreements but not on those which merely *terminate* other proclamations, since the latter can do no more than restore rates which have already been legally established, and are thus inherently limited.

The Government brief points out that there have been cases in which paragraph (a)(2) of Section 350 as amended in 1945 has been administratively interpreted to permit a change in duty by more than 50 per cent of the 1945 rate by means of a terminating proclamation and that since those cases arose Congress has repeatedly amended the Reciprocal Trade Agreement Act without indicating disapproval of such interpretations.

The same brief points out that the Trade Agreement Extension Act of 1955, a revision of the original 1934 statute, contains a provision which limits the prohibition against rate changes of more than 50 per cent of the January 1, 1945 rate to proclamations which *carry out* a foreign trade agreement, and that the Congressional committee reports with respect to that provision stated that it "*continues unchanged* the present prohibition against increasing any rate of duty to more than 50 percent above the rate existing on January 1, 1945." (Emphasis ours). There is thus a clear indication that those who drafted the committee reports were of the opinion that the "No proclamation" limitation in the 1945 amendment of paragraph (a)(2) applied only to proclamations giving effect to trade agreements.

In view of the circumstances above set forth, we conclude that the prohibition contained in the second sentence of paragraph (a)(2) of Section 350 of the Tariff Act of 1930, as amended by the Act of July 5, 1945, is not applicable to proclamations which *terminate* other proclamations.

Part I(b) of Proclamation No. 2901 purports to terminate the proclamations which related to the Mexican trade agreement and established the rate of duty of ¼ cent per gallon for all crude petroleum imports. Considering that part to be valid and effective for its stated purpose, its effect would be to remove that agreement from the picture and to reestablish the rate of duty existing prior to the proclamation of the Mexican agreement. That rate was the ½ cent per gallon as provided for by section 3422 of the Internal Revenue Code, except that, as to crude petroleum falling *within* the 5% quota specified in the proclamation of the Venezuelan agreement, the rate was ¼ cent per gallon. The petroleum here involved was outside that quota. While the act of July 5, 1945 established the rates of duty existing on January 1, 1945 as a new base rate for the prohibition contained in the second sentence of paragraph (a)(2), it did not otherwise change the status of those rates in any respect pertinent here. Specifically, it did not alter the status of the tax on over-quota crude petroleum imports which had been fixed at ½ cent per gallon by the Internal Revenue Code and reduced to ¼ cent per gallon by the Mexican agreement, during the life of that agreement. It follows that Part I(b) of Proclamation No. 2901, if not invalidated by other parts of the proclamation, had the effect of restoring the rate of ½ cent per gallon as to over-quota imports.

It is evident from the portions of Proclamation No. 2901 above quoted and possibly others,[2] that its drafters were of the opinion that the termination of the proclamation of the Mexican agreement would restore in full the rates specified in Section 3422 of the Internal Revenue Code and that in order to reestablish the quota and reduced rate included in the Venezuelan agreement it was necessary to again proclaim them. As above noted, the Venezuelan agreement has no direct application to the instant case, which concerns only over-quota petroleum, but we are of the opinion that the termination of the proclamation of the Mexican agreement served to restore to full operativeness the original proclamation of the Venezuelan agreement in the same manner as it restored section 3422 of the Internal Revenue Code.

It is contended by the importer that Part IV of Proclamation No. 2901, which purports to proclaim anew the provisions of the Venezuelan proclamation, is in violation of paragraph (a)(2) of Section 350 as amended in 1945, *ultra vires*, and void since it seeks to increase a rate of duty by more than 50% of the January 1, 1945 rate. The Government urges that Part IV is merely redundant in seeking "to accomplish what already was the law" since the rates which it purports to establish are made effective by Part I(b). It is unnecessary for us to decide which of those positions is correct, since it is clear to us that, whether because of invalidity or superfluity, Part IV is ineffective to establish any rate whatever.

It remains to be considered whether the fact that Part IV of Proclamation No. 2901 is a nullity serves to render

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[2] Recital 15 reads as follows: "Whereas upon the termination of the said proclamation of December 31, 1942, the said item 3422 set forth in the thirteenth recital of this proclamation and the said first item 3422 set forth in the fourteenth recital hereof will become fully effective."

Part I(b) void. Even if we accept the importers' argument that Part IV is illegal, *ultra vires* and hence void, the test of validity of the remainder to be applied in such a case would appear to be the same as that applied in cases of partial invalidity of statutes due to unconstitutionality, namely, as stated in *Allen* v. *Louisiana,* 103 U. S. 80, 84, "whether the unconstitutional provisions are so connected with the general scope of the law as to make it impossible, if they are stricken out, to give effect to what appears to have been the intent of the legislature."

We are of the opinion, as was the Customs Court, that Parts I(b) and IV of Proclamation No. 2901 are severable. It is evident that the intention of the proclamation, so far as the involved petroleum products are concerned, was to restore the situation which had existed prior to the proclamations carrying out the Mexican trade agreement and while the Venezuelan proclamation was in full effect. In our opinion, that is exactly what was done by Part I(b) standing alone. The elimination of Part IV, therefore, clearly would not serve to render the apparent intent of Proclamation 2901 ineffective in any respect.

It seems to be contended by the importer, and to have been held by the Customs Court, that the courts cannot review the President's recited determination that Part IV of Proclamation No. 2901 was "required or appropriate to carry out" the Venezuelan trade agreement, and must therefore conclude that the said proclamation remains ineffective unless Part IV can restore it. We are unable to agree with that argument. No doubt the courts cannot substitute their discretion for that of the President in proclaiming trade agreements, but where, as here, the President bases his action on an incorrect interpretation of the effect of a law or proclamation, the courts

are not bound to accept that interpertation as correct. We are not barred from holding that Part IV is legally ineffective for the reason that it purports to do that which had already been done by the proclamation of November 16, 1939 which carried out the Venezuelan trade agreement and which was still in force.

We agree with the Government that while the wording of Proclamation No. 2901 leaves much to be desired, the intended purpose of the proclamation, so far as it relates to the import tax on the involved petroleum products, was within the scope of the President's authority, and the valid provisions of the proclamation are sufficient to give effect to that purpose. We are accordingly of the opinion, as we were in the *Metropolitan* case, that the collector's assessment of a tax or duty of ½ cent per gallon on the merchandise here involved was proper.

Before concluding this consideration we should like to revert to the fact that the Customs Court, though it acknowledged that this case is, "in all material respects, similar to that which was decided by a majority of our appellate court" in the *Metropolitan* case, permitted itself to be persuaded not to adhere to our decision therein that the proper rate of tax is ½ cent, and to go further and evolve an entirely new tax rate of ⅜ cent. So far as we can determine from the Customs Court's opinion, the reason for this was a mistake in concluding from certain passages in the *Metropolitan* opinion "that our appellate court was applying to the situation and enforcing the provisions of the Venezuelan Trade Agreement *as such* and not the Presidential proclamation, issued in relation thereto." This is closely parallel to the contention in the importers' brief before us that "this court departed from the statute when it held in the *Metropoli-*

tan Petroleum case * * * that the tax of ½ cent * * * became effective in 1951 by virtue of the provisions of the Venezuelan Trade Agreement * * *. The law did not give such force to a trade agreement alone." Both the lower court and the importers have favored us with several pages of instruction on the legal necessity of implementing trade agreements by means of proclamations. Perhaps the opinion in the *Metropolitan* case presumed too much on the reader's powers of observation, so we would like to point out that it refers three times directly, and several times more by inference, to the 1939 proclamation carrying out the Venezuelan trade agreement. On the whole we think it very plain that the opinion was based on the premise that the Venezuelan agreement was in effect, and remained in effect, by virtue of an unrescinded *proclamation*.

The decision of the United States Customs Court is *reversed*.

REVERSED

Jackson, J., Retired, recalled to participate herein in place of Cole, J., absent because of illness.

United States Court of Customs and Patent Appeals

* * *

THE UNITED STATES, *Appellant*, *v.* AMERICAN BITUMULS & ASPHALT Co., *et al.*, *Appellees.*	October Term 1956. Cutoms Appeal No. 4899. Customs Calendar No. 37.
AMERICAN BITUMULS & ASPHALT Co., *et al.*, *Appellants*, *v.* THE UNITED STATES, *Appellee.*	October Term 1956. Customs Appeal No. 4900. Customs Calendar No. 38.

WORLEY, Judge concurring.

My dissent in the *Metropolitan* case was based on the belief that the language in Section 350(a)(2) of the Tariff Act of 1930, as amended, that "No proclamation shall be made increasing or decreasing by more than 50 per centum any rate of duty, however established, existing on January 1, 1945, * * *" was applicable to *all* proclamations.

The *Metropolitan* case was decided in 1954. Even before then, however, the above section appears to have been interpreted by the executive branch as not applicable to "terminating" proclamations. Since Congress has ex-

tended the Reciprocal Trade Agreements Act without indicating dissatisfaction with that interpretation, or with this court's interpretation in the *Metropolitan* case, I must assume they are consistent with the congressional purposes and objectives, and, accordingly, concur with the majority herein.

United States Court of Customs and Patent Appeals

At a session of said court continued and held at the city of Washington, pursuant to adjournment, on this 25th day of June, A. D. 1957.

* * *

THE UNITED STATES, *Appellant*, *v.* AMERICAN BITUMULS & ASPHALT Co., *et al.*, *Appellees.*	Customs Appeal No. 4899.
AMERICAN BITUMULS & ASPHALT Co., *et al.*, *Appellants*, *v.* THE UNITED STATES, *Appellee.*	Customs Appeal No. 4900.

Said appeals having heretofore been brought on to be heard before the court and due consideration thereon having been had, it is:

ORDERED that the judgment of the United States Customs Court be, and the same is hereby, reversed, and said cause is remanded to said court for further proceedings consistent with the views expressed in the opinion of this court herein.

I, CABELL N. PRYOR, Clerk of the United States Court of Customs and Patent Appeals, do hereby certify that the above is a true and correct copy of the order made in the above-entitled case on the 25th day of June, A. D. 1957.

Witness my hand and seal of this court this 1st day of August, A. D. 1957.

CABELL N. PRYOR
Clerk.

(SEAL OF THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS)

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No. 493

In the Supreme Court of the United States

October Term, 1957

AMERICAN BITUMULS & ASPHALT CO., ET AL.,
PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Customs and Patent Appeals

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

October Term, 1957

No. 493

AMERICAN BITUMULS & ASPHALT CO., ET AL.,
PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Customs and Patent Appeals

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Customs Court (R. 15-41) is reported at 37 Cust. Ct. 58, 146 F. Supp. 703. The opinion of the United States Court of Customs and Patent Appeals (Pet. 13a-29a) is reported at 246 F. 2d 270.

JURISDICTION

The judgment of the United States Court of Customs and Patent Appeals was entered on June 25, 1957 (Pet. 29a-30a). The petition for a writ of certiorari was filed on September 23, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1256.

QUESTION PRESENTED

Whether the court below erred in adhering to its ruling in *United States* v. *Metropolitan Petroleum Corp.*, 42 C.C.P.A. (Customs) 38, certiorari denied, 348 U.S. 858, which held that, as the result of the termination of the proclamation carrying out the Mexican Trade Agreement (Proclamation No. 2901 of September 6, 1950), the tax rate on imported fuel oil automatically reverted to the rate which would have existed but for that terminated agreement, and that the prohibition of the Reciprocal Trade Agreements Act against proclamations increasing or decreasing by more than 50 per centum any rate of duty, however established, existing on January 1, 1945, does not apply to proclamations terminating a proclamation carrying out a Trade Agreement.

STATUTES, TRADE AGREEMENTS AND PROCLAMATIONS INVOLVED

The pertinent parts of the Reciprocal Trade Agreements Act and of the Trade Agreements and Proclamations involved are set forth in the Appendix, *infra*, pp. 17-23.

STATEMENT

1. *The background.* The factual and statutory background is virtually identical with that in *Metropolitan Petroleum Corp.* v. *United States*, No. 303, October Term, 1954, certiorari denied, 348 U.S. 858. Section 350 of the Tariff Act of 1930 added by the Reciprocal Trade Agreements Act of 1934, *infra*,

pp. 17-18,[1] authorizes the President to enter into trade agreements with foreign governments when he finds that "any existing duties or other import restrictions of the United States or any foreign country are unduly burdening and restricting the foreign trade of the United States and that the purpose[s] * * * [of the Act] will be promoted * * *" thereby.

Section 350(a)(2) (*infra*, pp. 17-18) empowers the President "[t]o proclaim such modifications of existing duties and other import restrictions * * * as are required or appropriate to carry out any [such] foreign-trade agreement * * *". As originally enacted in 1934, Section 350 provided that no proclamation shall be made, increasing or decreasing an existing rate[2] of duty by more than 50 per centum.[3] The Act of July 5, 1945, Stat. 410, *infra*, p. 19, amended that passage to read:

> No proclamation shall be made increasing or decreasing by more than 50 per centum any rate of duty, however established, existing on January 1, 1945 * * *.[4]

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[1] Section 350 was thoroughly revised in 1955 (*infra*, pp. 19-21). We shall refer to its text in its pre-1955 form.

[2] A rate established by proclamation carrying out a foreign trade agreement was not considered an "existing" rate. 39 Op. A.G. 42.

[3] We shall refer to this clause as the 50 per centum prohibition.

[4] The reason for this amendment was that, by 1945, trade agreements had lowered the tariff rates by 50 per centum with respect to nearly one half of all dutiable imports, and that the President had to be given additional powers to lower customs in exchange for further concessions to be

Paragraph (a) (2) further provides in its Generalization Clause that the modified duties proclaimed by the President apply not only to the country with which the trade agreement has been concluded, but to the imports from all other countries. The President, however, has the authority to suspend such concessions with respect to any country discriminating against American commerce. Pursuant to the terminal sentence of the paragraph, any proclamation carrying out a trade agreement may be terminated by the President at any time in whole or in part.

Fuel oil,[5] the commodity involved in this litigation, is not subject to a customs duty under the Tariff Act proper.[6] It is, however, subject to an import tax of ½ of one cent per gallon under the Internal Revenue Code.[7]

The first trade agreement which affected the import tax on fuel oil was the agreement with Venezuela, 54 Stat. (Pt. 2) 2375, T.D. 50015, 75 Treas. Dec. 166, 173, made effective as of December 16, 1939, by Proclamation dated November 16, 1939, 54 Stat. (Pt. 2)

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given to the United States. H. Rep. No. 594, 79th Cong., 1st Sess., pp. 8, 35, 36, S. Rep. No. 356, 79th Cong., 1st Sess. See also the statement of Rep. Doughton, explaining the bill on the floor of the House, 91 Cong. Rec. 4871.

[5] We shall use the term "fuel oil" as including crude petroleum and fuel oil derived from petroleum derivates.

[6] Tariff Act of 1930, Section 201, Par. 1733, 46 Stat. 590, 680, 19 U.S.C. 1201, Par. 1733.

[7] Cf. Secs. 3420, 3422 of the Internal Revenue Code of 1939, which was in effect at the time of the imports. The import tax on petroleum products is now covered by Section 4521 of the Internal Revenue Code of 1954.

2375, 2401. Under this agreement, the import tax on crude petroleum, topped crude petroleum, and fuel oil derived from petroleum was lowered to ¼ of one cent for a tariff quota amounting roughly to 5 per centum of the crude petroleum processed in the refineries of the continental United States during the preceding calendar year. Imports in excess of such quota were not entitled to this reduced rate; the tax on them, however, was not to exceed ½ of one cent per gallon, *i.e.*, the statutory rate (*infra*, p. 21).

In 1942, the United States entered into an agreement with Mexico (57 Stat. (Pt. 2) 833, 909, T.D. 50797, 78 Treas. Dec. 190, 204), carried into effect as of January 30, 1943, by the Presidential Proclamations of December 28 and 31, 1942 (57 Stat. (Pt. 2) 833, 909, T.D. 50797, 78 Treas. Dec. 199-206), pursuant to which the import tax on fuel oil was lowered to ¼ of one cent without any tariff quota restrictions (*infra*, p. 22). This tax rate became applicable to all foreign countries by virtue of the Generalization Clause (*supra*, p. 4). Consequently, while the Mexican Agreement was in effect, there was no occasion to apply the higher rates of the Venezuelan Agreement.[8]

[8] Under the General Agreement on Tariffs and Trade (GATT), 61 Stat. (Pt. 5) A11, A1346, T.D. 51802, 82 Treas. Dec. 305, the import tax on fuel oil derived from petroleum is ¼ of one cent per gallon, but not less than the tax rate on crude petroleum (*infra*, p. 22). As we have shown, the tax rate on crude petroleum was ¼ of one cent per gallon under the Mexican Agreement and ½ of one cent per gallon for over-quota imports under the Venezuelan Agreement.

In 1950, the Governments of the United States and Mexico agreed that the Mexican Agreement should come to an end on December 31, 1950. Part I(b)[9] of the Proclamation No. 2901 of September 6, 1950 terminated, as of the close of December 31, 1950, the Proclamations of December 28 and 31, 1942, which had carried the Mexican Agreement into effect. In view of the complicated interplay of the Venezuelan Agreement and the General Agreement on Tariffs and Trade (GATT),[10] Part IV of the Proclamation specified certain customs duties and tax rates which would be in effect beginning January 1, 1951. The Proclamation stated that the rates for over-quota crude petroleum and fuel oil derived from petroleum would be ½ of one cent per gallon and that this would "carry out" the Venezuelan Trade Agreement and GATT.

2. *The controversy concerning the effect of the termination of the Proclamation carrying out the Mexican Agreement. United States v. Metropolitan Petroleum Corp., 42 C.C.P.A. (Customs) 38, certiorari denied, 348 U.S. 858.* Beginning January 1, 1951, the customs officials assessed fuel oil imports in excess of the quota (*supra*, pp. 4-5) at the rate of ½ of one cent per gallon. The importers protested on the ground that Proclamation No. 2901 had exceeded the President's statutory authority by purporting to raise the tax rate from ¼ of one cent to

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[9] 64 Stat. (P. 2) A427, T.D. 52559, 85 Treas. Dec. 252, *infra*, pp. 22-23.

[10] Cf. fn. 8.

½ of one cent, i.e., by 100 per centum of the 1945 rate.[11]

After the rejection of their protests by the Collector of Customs (cf. R. 12-13), the importers took a test case, *Metropolitan Petroleum Corp.* and *Herbert B. Moller* to the courts. The Customs Court decided in favor of the importers (31 Cust. Ct. 71). The Court of Customs and Patent Appeals, however, reversed. 42 C.C.P.A. (Customs) 38. It held that a proclamation terminating a proclamation carrying out a trade agreement was not subject to the 50 per centum prohibition; that, as the result of the termination proclamation, the Venezuelan Agreement, which had been dormant during the life of the Mexican Agreement, was reinstated by operation of law; and, finally, that the language in Proclamation No. 2901 (Part IV) purporting to carry out the Venezuelan Agreement[12] was redundant and merely declaratory of what the law would have been without it. It consequently agreed with the Government that the proper import tax rate for over-quota fuel oil amounted to ½ of one cent per gallon. Judge Worley dissented on the ground that, in his opinion, the 50 per centum prohibition applied to every proclamation issued under the authority of the Reciprocal Trade Agreements Act (42 C.C.A.P. (Customs) 38,

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[11] This result, of course, is based upon the mathematical truism that a decrease from ½ cent to ¼ cent is a 50 per centum reduction, while the corresponding rise from ¼ cent to ½ cent is a 100 per centum increase.

[12] *Supra*, p. 6, and *infra*, p. 23.

47). This Court denied a petition for a writ of certiorari (348 U.S. 858).

In the following year, the Trade Agreements Extension Act of 1955 [13] extensively revised the original Reciprocal Trade Agreements Act. The revision spells out that the 50 per centum prohibition applies only to proclamations carrying out a trade agreement and that it has no bearing whatever on terminating proclamations. The pertinent committee reports state that this particular amendment of the Act "continues a provision of existing law; it has been moved to this separate paragraph solely for reasons of clarity." [14]

3. *The proceedings below.* Petitioner was among those who had imported fuel oil into the United States during the period between January 1, 1951, the termination date of the Mexican Agreement (*supra*, pp. 6-7), and October 11, 1952, when a supplemental agreement with Venezuela became effective (R. 3).[15] Its protests against the assessment of the import tax at the rate of ½ of one cent per gallon were denied and transferred to the Customs Court pursuant to Section 515 of the Tariff Act of 1930, 46 Stat. 734, 19 U.S.C. 1515. There, the case remained in abeyance pending the outcome of the *Metropolitan* case.

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[13] Section 3, 69 Stat. 162, *infra*, pp. 19-21.

[14] H. Rep. No. 50, 84th Cong., 1st Sess., p. 17; S. Rep. No. 232, 84th Cong., 1st Sess., p. 9.

[15] 3 U.S.T. 4195, 4228. Under this Agreement, fuel oil became subject to an import tax varying from ⅛ to ¼ of a cent per gallon depending on its density.

After that test case had been decided adversely to the importers, petitioner pressed his own protests still pending in the Customs Court.[16] That tribunal, although realizing that petitioner's case was "in all material aspects similar to" *Metropolitan* (R. 16-17), refused to be bound by the ruling of the Court of Customs and Patent Appeals, and decided that the proper import tax rate for fuel oil was 3/8 of a cent per gallon, *i.e.*, a rate 50 per centum higher than the one provided for in the Mexican Agreement (R. 15-41). Both parties appealed from the decision of the Customs Court. The Government sought review on the ground that the court should have found that the proper tax rate was ½ of one cent per gallon (R. 1-4), and petitioner (the importer) cross-appealed, claiming that the proper rate was ¼ of one cent (R. 5-7).

The Court of Customs and Patent Appeals reversed the decision of the Customs Court on the Government's appeal (Pet. 13a-30a). It emphasized that "[t]he ultimate issue to be decided here is identical with that presented to this court in 1954 and decided in *United States* v. *Metropolitan Petroleum Corp., et al.*, 42 C.C.P.A. (Customs) 38 * * *" and that it was "still of the view that the tax of ½ cent per gallon, held to be the proper rate in the *Metropolitan* case, is the only proper rate and we shall try to state our reasons in sufficiently clear English to avoid further misunderstanding" (Pet. 14a).

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[16] Petitioner's attorney in the Customs Court and in the Court of Customs and Patent Appeals, of counsel here, also represented the importer in *Metropolitan Petroleum Corporation.*

In particular, the court held that the 50 per centum prohibition did not apply to terminating proclamations, because it was not likely that Congress intended to prevent the return to the statutory rate after the termination of a trade agreement,[17] and because the considerations which justified restrictions upon the President's power to depart from the statutory rates did not apply to presidential action restoring those rates (Pet. 21a-22a). In addition, the court recognized that as early as 1947 the administrative interpretation of the statute had been that the 50 percentum prohibition did not apply to terminating proclamations, and that Congress repeatedly had amended the Act, fully aware of this interpretation, without disapproving it (Pet. 22a). The court also referred to the Trade Agreements Extension Act of 1955 which expressly limits the 50 per centum prohibition to carrying-out proclamations (*supra*, p. 8), and to its legislative history which clearly indicates that this amendment was intended to restate and clarify existing law (Pet. 22a). The court therefore held that Part I(b) of the Proclamation (*infra*, p. 23), terminating the proclamation carrying out the Mexican Agreement, had the effect of re-establishing the

[17] The court explained that, upon the termination of a trade agreement, the foreign country withdraws the concessions in consideration of which the United States has lowered its tariff rates. Hence, if, upon such termination, the United States could not revert to the statutory rate, it would have to continue a part of the concession without receiving anything in exchange. The court was unwilling to place "[s]uch an interpretation * * * on the statute if its language will support a more reasonable one" (Pet. 21a-22a).

tax rate existing prior to (or but for) the proclamation of that agreement, *i.e.*, ½ of one cent per gallon (Pet. 23a).

With respect to Part IV of the Proclamation, which purported to carry the Venezuelan Agreement into effect, the court held that it was either void or surplusage, and that, in any event, it could be severed from the rest of the Proclamation without invalidating it (Pet. 24a-26a). The court finally addressed itself to petitioner's contention, repeated here (Pet. 2, fn. 1), that in *Metropolitan* the court had addressed itself only to the trade agreement and not to the presidential proclamation issued in relation thereto, and that *Metropolitan* consequently had not settled the validity of the proclamation itself (Pet. 26a-27a). The court stated:

> Perhaps the opinion in the *Metropolitan* case presumed too much on the reader's powers of observation, so we would like to point out that it refers three times directly, and several times more by inference, to the 1939 proclamation carrying out the Venezuelan trade agreement. On the whole, we think it very plain that the Venezuelan agreement was in effect, and remained in effect, by virtue of an unrescinded proclamation.

Judge Worley, who had dissented in the *Metropolitan* case, concurred on the ground that the failure of Congress to object to the administrative interpretation of the act and to the decision in *Metropolitan* convinced him that the prior construction of the statute was consistent with the congressional purpose (Pet. 28a-29a).

ARGUMENT

1. When the questions raised by this petition were first presented, in 1954, in the *Metropolitan Petroleum Corp.* case, this Court concluded that they did not merit review. At that time, the Court of Customs and Patent Appeals was divided. That is no longer so. The dissenter in *Metropolitan Petroleum* agrees that the Government's interpretation of the Act conforms to the congressional purposes. Moreover, the Trade Agreements Extension Act of 1955 (*supra*, p. 8), passed since certiorari was denied in *Metropolitan Petroleum*, indicates that the ruling in that case, as well as the ruling below, is in full accord with the congressional understanding of the statute. Finally, the 1955 statute, by clarifying the wording of the statute, has precluded the possibility that this problem will arise again in the future.[18] At this juncture, there is no basis whatever for a claim of general importance.[19]

2. Moreover, the decision below is clearly correct.

a. The court below based its ruling that the 50 per

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[18] On the whole, these questions are of substantial importance only with respect to oil imports made between January 1, 1951 and October 11, 1952, *i.e.*, the period between the Proclamations terminating the Mexican Proclamation and the one carrying out the supplemental Venezuelan Agreement (*supra*, p. 8). *Metropolitan Petroleum* served as the test case for those imports and we cannot perceive the need for any further litigation on this score.

[19] The unique problems raised by the inartistic formulation of Proclamation No. 2901, of course, are of no general concern justifying review by this Court. They are not likely to recur (cf. Pet. 26a).

centum prohibition did not apply to terminating proclamations on three main grounds:

First, it reasoned that Congress could not have intended to compel the United States to continue to make customs concessions after the termination of a trade agreement for which it no longer receives a *quid pro quo* (*supra*, p. 10, and Pet. 21a).[20] This interpretation is eminently reasonable; coming from the tribunal which is peculiarly familiar with the body of laws governing customs, import taxes, and reciprocal trade agreements, it is entitled to high respect.

Second, the court pointed out that the administrative interpretation was that the 50 per centum prohibition did not apply to termination proclamations,[21] and that Congress had repeatedly extended and

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[20] If petitioner's claim that the 50 per centum prohibition applies to every proclamation issued under the Reciprocal Trade Agreements Act were correct, the President could not, even by way of retaliation, impose the statutory rates upon countries discriminating against American commerce (cf. p. 4, *supra*).

[21] For instances in which custom duties had been raised by more than 50 per centum as the result of terminating proclamations, see, *e.g.*, the Proclamation of February 22, 1947, T.D. 51634, 82 Treas. Dec. 59, terminating an agreement with Canada, as the result of which the duties on linen fire hose were raised from 10¢ per pound and 7½ per centum *ad valorem* to 19½¢ per pound and 15 per centum *ad valorem*, *i.e.*, by nearly 100 per centum. For other examples, see, *e.g.*, Proclamation No. 2865 of November 30, 1949 (64 Stat. (Pt. 2) A376) and Proclamation No. 2946 of October 4, 1951 (65 Stat. C39, C40).

amended the Reciprocal Trade Agreements Acts [22] with full knowledge of this interpretation [23] (Pet. 22a-23a). The court below properly concluded that in these circumstances the extensions and amendments constituted congressional approval and ratification of the administrative interpretation of the Act.[24]

Third, the court below correctly noted that the legislative history of the Trade Agreements Extension

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[22] Acts of September 26, 1949, 63 Stat. 698; June 16, 1951, 65 Stat. 72; August 7, 1953, 67 Stat. 472; July 1, 1954, 68 Stat. 360; June 21, 1955, 69 Stat. 162.

[23] H. Rep. No. 14, 82d Cong., 1st Sess., p. 14, referring to the Trade Agreements Extension Act of 1951 (*supra*, fn. 22), cites with approval the Proclamation of February 22, 1947 (increasing the import duties on linen fire hose by nearly 100 per centum (*supra*, fn. 21)), H. Rep. No. 19, 81st Cong., 1st Sess., p. 2, and 95 Cong. Rec. 997, referring to the Trade Agreements Extension Act of 1949 (*supra*, fn. 22), point out that Proclamation No. 2865 (*supra*, fn. 21) would raise custom duties by more than 50 per centum over the 1945 level. The Committee Report took the position that "such modifications would be within the existing authority" with respect to all countries except Cuba which has special preferential rights under the Treaty of December 22, 1902, 33 Stat. (Pt. II) 2136. See, also, Hearings before the House Ways and Means Committee, 83d Cong., 1st Sess., on H.R. 4294, p. 1960, referring to the Trade Agreements Extension Act of 1953, *supra*, fn. 22.

[24] *United States* v. *Allen-Bradley Company*, 352 U.S. 306, 308-311; *Corn Products Co.* v. *Commissioner*, 350 U.S. 46, 53; *Allen* v. *Grand Central Aircraft Co.*, 347 U.S. 535, 544-549; *Shapiro* v. *United States*, 335 U.S. 1, 6; *Commissioner* v. *Flowers*, 326 U.S. 465, 469; *Helvering* v. *Winmill*, 305 U.S. 79, 82-83; *Norwegian Nitrogen Co.* v. *United States*, 288 U.S. 294, 310-315; *Hecht* v. *Mailey*, 265 U.S. 144, 153; see also *Brooks* v. *Dewar*, 313 U.S. 354, 361; *Fleming* v. *Mohawk Co.*, 331 U.S. 111, 118-119; *Mitchell* v. *Covington Mills*, 229 F. 2d 506, 509 (C.A.D.C.), certiorari denied, 350 U.S. 1002.

Act of 1955 shows that Congress' understanding of prior law was in accord with the settled administrative interpretation.[25]

b. The court below was also correct in holding that the validity of the Proclamation as a whole was not affected by Part IV, which purported to "carry out" the Venezuela Agreement and GATT (*supra*, pp. 6-11). Even if a "carrying out" proclamation may not increase the custom rates by more than 50 per centum over the January 1, 1945 level, Part IV was not intended to do anything that was not already accomplished by Part I(b), which had terminated the Mexican Agreement.[26] It was therefore proper to treat Part IV as a nullity and to sever it from the rest of the Proclamation,[27] thereby giving effect to the plain purpose of the Executive without making a fortress of the dictionary.[28] Petitioner has not shown that it was

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[25] Cf. *United States* v. *Stafoff*, 260 U.S. 477, 480; *First National Bank* v. *Missouri*, 263 U.S. 640, 658-659; *Bailey* v. *Clark*, 21 Wall. 284, 288; *Stockdale* v. *Insurance Companies*, 20 Wall. 323, 331.

[26] We submit that Part IV was not designed to have a specific legal import, but rather that, in view of the complex interplay of the Venezuelan Agreement, of GATT, and of the Internal Revenue Code, it was intended to serve as a notice to the public, and as an instruction to the customs officials, advising them of the rate to which imported fuel oil would be subject after January 1, 1951. See *supra*, p. 6.

[27] See *Champlin Refining Co.* v. *Corporation Commission*, 286 U.S. 210, 235; *Willcox* v. *Consolidated Gas Co.*, 212 U.S. 19, 53; *Dorchy* v. *Kansas*, 264 U.S. 286, 290; *Lynch* v. *United States*, 292 U.S. 571, 586; *Poindexter* v. *Greenhow*, 114 U.S. 270, 304-305.

[28] *Keifer & Keifer* v. *R. F. C.*, 306 U.S. 381, 389, 391, fn. 4; *Johnson* v. *United States*, 163 Fed. 30, 32 (C.A. 1, per

prejudiced in any way by the drafting of the Proclamation.

CONCLUSION

For the above reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1957.

Holmes, Circuit Justice); *Cabell* v. *Markham*, 148 F. 2d 737, 739 (C.A. 2), affirmed, 326 U.S. 404.

APPENDIX

1. In 1951 Section 350 of the Tariff Act of 1930 (Section 1 of the Reciprocal Trade Agreements Act of June 12, 1934), 48 Stat. 943, as amended by the Acts of June 7, 1943, 57 Stat. 125, July 5, 1945, 59 Stat. 410 and September 26, 1949, 63 Stat. 698, 19 U. S. C. A. 1351 [48] provided in pertinent part:

> (a) For the purpose of expanding foreign markets for the products of the United States (as a means of assisting in establishing and maintaining a better relationship among various branches of American agriculture, industry, mining, and commerce) by regulating the admission of foreign goods into the United States in accordance with the characteristics and needs of various branches of American production so that foreign markets will be made available to those branches of American production which require and are capable of developing such outlets by affording corresponding market opportunities for foreign products in the United States, the President, whenever he finds as a fact that any existing duties or other import restrictions of the United States or any foreign country are unduly burdening and restricting the foreign trade of the United States and that the purpose above declared will be promoted by the means hereinafter specified, is authorized from time to time—
>
> (1) To enter into foreign trade agreements with foreign governments or instrumentalities thereof; and
>
> (2) To proclaim such modifications of existing du ies and other import restriction, or such additional import restrictions, or such continuance, and for such minimum periods, of existing customs or excise treatment of any article cov-

[48] The text of 19 U. S. C. (1952 ed.) 1351 is incomplete due to a typographical error.

ered by foreign-trade agreements, as are required or appropriate to carry out any foreign-trade agreement that the President has entered into hereunder. No proclamation shall be made increasing or decreasing by more than 50 per centum any rate of duty, however established, existing on January 1, 1945 (even though temporarily suspended by Act of Congress), or transferring any article between the dutiable and free lists. The proclaimed duties and other import restrictions shall apply to articles the growth, produce, or manufacture of all foreign countries, whether imported directly, or indirectly: *Provided*, That the President may suspend the application to articles the growth, produce, or manufacture of any country because of its discriminatory treatment of American commerce or because of other acts (including the operations of international cartels) or policies which in his opinion tend to defeat the purposes set forth in this section; and the proclaimed duties and other import restrictions shall be in effect from and after such time as is specified in the proclamation. The President may at any time terminate any such proclamation in whole or in part.

(b) Nothing in this section shall be construed to prevent the application, with respect to rates of duty established under this section pursuant to agreements with countries other than Cuba, of the provisions of the treaty of commercial reciprocity concluded between the United States and the Republic of Cuba on December 11, 1902, or to preclude giving effect to an exclusive agreement with Cuba concluded under this section, modifying the existing preferential customs treatment of any article the growth, produce, or manufacture of Cuba. Nothing in this Act shall be construed to preclude the application to any product of Cuba (including products preferentially free of duty) of a rate of duty not higher than the rate applicable to the

like products of other foreign countries (except the Philippines), whether or not the application of such rate involves any preferential customs treatment. No rate of duty on products of Cuba shall in any case be decreased by more than 50 per centum of the rate of duty, however established, existing on January 1, 1945 (even though temporarily suspended by Act of Congress).

2. The Act of July 5, 1945, 59 Stat. 410, provides in pertinent part:

> * * * the period during which the President is authorized to enter into foreign trade agreements under section 350 of the Tariff Act of 1930, as amended and extended, is hereby extended for a further period of three years from June 12, 1945.
>
> Section 2. (a) The second sentence of subsection (a) (2) of such section, as amended (U. S. C., 1940 edition, Supp. IV, title 19, sec. 1351 (a) (2)), is amended to read as follows:
> "No proclamation shall be made increasing or decreasing by more than 50 per centum any rate of duty, however established, existing on January 1, 1945 (even though temporarily suspended by Act of Congress), or transferring any article between the dutiable and free lists. * * *

3. Section 3 of the Trade Agreements Extension Act of 1955 (69 Stat. 162) amending Section 350 of the Tariff Act of 1930 provides in pertinent part:

> (a) (1) For the purpose of expanding foreign markets for the products of the United States (as a means of assisting in establishing and maintaining a better relationship among various branches of American agriculture, industry, mining, and commerce) by regulating the admission of foreign goods into the United States in accordance with the characteristics and needs of various branches of American production so that foreign markets will be made avail-

able to those branches of American production which require and are capable of developing such outlets by affording corresponding market opportunities for foreign products in the United States, the President, whenever he finds as a fact that any existing duties or other import restrictions of the United States or any foreign country are unduly burdening and restricting the foreign trade of the United States and that the purpose above declared will be promoted by the means hereinafter specified, is authorized from time to time—

(A) To enter into foreign trade agreements with foreign governments or instrumentalities thereof: *Provided*, That the enactment of the Trade Agreements Extension Act of 1955 shall not be construed to determine or indicate the approval or disapproval by the Congress of the executive agreement known as the General Agreement on Tariffs and Trade.

(B) To proclaim such modifications of existing duties and other import restrictions, or such additional import restrictions, or such continuance, and for such minimum periods, of existing customs or excise treatment of any article covered by foreign trade agreements, as are required or appropriate to carry out any foreign trade agreement that the President has entered into hereunder.

(2) No proclamation pursuant to paragraph (1) (B) of this subsection shall be made—

(A) Increasing by more than 50 per centum any rate of duty existing on January 1, 1945.

* * * * *

(4) Subject to the provisions of section 5 of the Trade Agreements Extension Act of 1951 (19 U. S. C., sec. 1362), duties and other import restrictions proclaimed pursuant to this section shall apply to articles the growth, produce, or manufacture of all foreign countries, whether imported directly or indirectly: *Provided*, That the President shall, as soon as practicable, sus-

pend the application to articles the growth, produce, or manufacture of any country because of its discriminatory treatment of American commerce or because of other acts (including the operations of international cartels) or policies which in his opinion tend to defeat the purposes of this section.

(5) The President may at any time terminate, in whole or in part, any proclamation made pursuant to this section.

* * * * *

4. The Trade Agreement with Venezuela, 54 Stat. (Pt. 2) 2375, 2387, T. D. 50015, 75 Treas. Dec. 166, 173 provides in pertinent part:

SCHEDULE II

Internal Revenue Code Section	Description of article	Rate of import tax
3422	Crude petroleum, topped crude petroleum, and fuel oil derived from petroleum including fuel oil known as gas oil	¼c per gal.
	Provided, That such petroleum and fuel oil entered, or withdrawn from warehouse, for consumption in any calendar year in excess of 5 per centum of the total quantity of crude petroleum processed in refineries in continental United States during the preceding calendar year, as ascertained by the Secretary of the Interior of the United States shall not be entitled to a reduction in tax by virtue of this item, but the rate of import tax thereon shall not exceed	½c per gal.
	Provided further, That if this item becomes effective after the beginning of a calendar year the quantity of such petroleum and fuel oil which may be entered or withdrawn from warehouse for consumption at the reduced rate during the remainder of such calendar year shall be one-twelfth of the foregoing quantity multiplied by the number of months (treating any part of a month as a full month) during which this item shall be in effect during such calendar year.	

5. The Trade Agreement with Mexico, 57 Stat. (Pt. 2) 833, 898, 909, T. D. 50797, 78 Treas. Dec. 190, 204, provides in pertinent part:

SCHEDULE II

Internal Revenue Code Section	Description of article	Rate of import tax
3422	Crude petroleum, topped crude petroleum, and fuel oil derived from petroleum including fuel oil known as gas oil.....	¼c per gal.

6. The General Agreement on Tariffs and Trade, 61 Stat. (Pt. 5) A11, A1346, T. D. 51802, 82 Treas. Dec. 305, provides in pertinent part:

SCHEDULE XX PART I

Internal Revenue Code Section	Description of Products	Rate of import tax
3422	Topped crude petroleum, fuel oil derived from petroleum including fuel oil known as gas oil, and all liquid derivatives of crude petroleum (except lubricating oil and such derivatives specified hereinafter in any item 3422) ..... *Provided*, That in no event shall the rate of import tax applicable under section 3422, Internal Revenue Code, or any modification thereof, to topped crude petroleum or fuel oil derived from petroleum be less than the rate of such tax applicable to crude petroleum.	¼c per gal.

7. The Presidential Proclamation No. 2901 terminating the Trade Agreement with Mexico, 64 Stat. A427, T. D. 52559, 85 Treas. Dec. 252, 259, provides in pertinent part:

NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, acting under and by virtue of the authority vested in me by the Constitution and the statutes, including the said section 350 of the Tariff Act of 1930, as amended, do proclaim as follows:

PART I

(a) * * *

(b) The said proclamations of December 28, and 31, 1942, relating to the said trade agreement with the United Mexican States, shall be terminated in whole as of the close of December 31, 1950.

* * * * *

PART IV

To the end that the said trade agreements specified in the first and twelfth recitals of this proclamation may be carried out, crude petroleum, topped crude petroleum, and fuel oil derived from petroleum, including fuel oil known as gas oil, entered, or withdrawn from warehouse, for consumption in any calendar year beginning with the calendar year 1951, in excess of an aggregate quantity of all such products equal to 5 per centum of the total quantity of crude petroleum processed in refineries in continental United States during the preceding calendar year, specified in the said item 3422 set forth in the thirteenth recital of this proclamation, shall be subject to import tax at the rate of ½ cent per gallon.

* * * * *

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